

C A S E S

DETERMINED

AT NISI PRIUS,

IN THE

COURT OF KING'S BENCH, &c.

CASES.

DETERMINED AT

Nisi Prius,

IN THE

Court of King's Bench,

From the Sittings after EASTER Term 30 GEORGE III.

To the Sittings after MICHAELMAS Term 35 GEORGE III.

BOTH INCLUSIVE.

BY THOMAS PEAKE,

OF LINCOLN'S INN.

THE SECOND EDITION CORRECTED, WITH SOME ADDITIONAL
CASES, AND REFERENCES TO SUBSEQUENT DECISIONS.

LONDON:

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FOR

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P. PHELAN, UPPER ORMOND-QUAY, DUBLIN.

1815.

A
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The Attorney
and Solicitor
General to have
precedence above
all the King's
Serjeants.

In the name and on the behalf of His Majesty.

GEORGE P. R.

WHEREAS Our Attorney and Solicitor General now have place and audience in Our Courts next after the two ancientest of Our Serjeants at Law for the time being, and before Our other Serjeants at Law ; We, considering the weighty and important Affairs in which Our Attorney and Solicitor General are employed in Our behalf, and in which the Attorney and Solicitor General of Us. Our Heirs and Successors, may hereafter be employed; do hereby ordain and direct, That at all times hereafter the Attorney and Solicitor General of Us, Our Heirs and Successors, shall have place and audience, as well before the said two ancientest of Our Serjeants at Law, as also before every person who now is one of Our Serjeants at Law, or hereafter shall be one of the Serjeants at Law of Us, Our Heirs or Successors : And We do hereby will and require you not only to cause this Our direction to be observed in Our Court of Chancery, but also to signify to the Judges of all Our other Courts at Westminster, that it is Our express pleasure that the same course be observed in all Our said Courts.

Given at Our Court at Carleton House, this fourteenth day of December, in the fifty-fourth year of His Majesty's reign.

By command of His Royal Highness the Prince Regent,
in the name and on the behalf of His Majesty.

SIDMOUTH.

To the Right Hon. John Lord Eldon,
Our Chancellor of Great Britain.



CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Easter Term,

51 GEORGE III.

THIRD SITTINGS IN TERM AT GUILDHALL.

1811.

WEBBER v. ROBERT MADDOCKS.

Wednesday,
May 22.

THIS was an action against the defendant as acceptor of a bill of exchange for 110*l.* dated 10th December 1810, drawn by Samuel Maddocks, payable to his own order at four months after date, and indorsed by him to the plaintiff.

The defence was, that the instrument declared upon had been altered materially after it had been negotiated, and that it was therefore void for want of a fresh stamp.

agreement.—The instrument so altered is a valid bill of exchange, without a fresh stamp, as it had not been negotiated in the shape of a promissory note, and the alteration may be considered as the mere correction of a mistake.

A and B. for a debt due to C. agree to give him a bill of exchange to be drawn by A. and accepted by B.—Instead of this, they send him a promissory note made by the one and indorsed by the other, which he immediately returns to be altered into a bill of exchange according to the

1811.
 WEBBER
 v.
 MADDOCKS.

It appeared that Samuel and Robert Maddocks being indebted to the plaintiff in the sum of 110*l.* they agreed to give him a bill of exchange at four months for this amount to be drawn by Samuel and accepted by Robert. Instead of a bill of exchange, they sent him a promissory note in the following form :

“ London, 10th December 1810.

“ Four months after date I promise to pay to my own
 “ order one hundred and ten pounds value received.

“ S. Maddocks.

(Indorsed) “ S. Maddocks.

“ R. Maddocks.”

The plaintiff was dissatisfied with the security in this form, and returned it that it might be altered into a bill of exchange according to the agreement. The words “ *I promise to*” were immediately struck out, a direction to R. Maddocks was subjoined, and he wrote his name as acceptor of the bill. It was then delivered back to the plaintiff.

Marryat for the defendant insisted that the instrument was completely vitiated by the alteration. It had existed and had been issued as a perfect promissory note, on which both the parties were liable. The stamp attached to the promissory note. The bill of exchange into which that was afterwards converted, was therefore without a stamp and void.

Lord ELLENBOROUGH.—I think the stamp impressed upon this paper is sufficient to render the instrument

strument available in its present form. It cannot be considered as having been negotiated as a promissory note. It never was issued to third persons. It remained in the hands and under the dominion of the original parties. Every thing continued *in fieri* till after the alteration. The stamp was not occupied till then. Webber instantly rejected it as a promissory note. The alteration only fulfilled the terms of the agreement, and may be treated as the correction of a mistake. There was a case some time ago before Mr. JUSTICE LE BLANC which was stronger than this, and where the instrument was held to be valid in its altered form. We had likewise recently occasion to consider this subject in a case upon the register of a ship (*a*), and the court was of opinion that unless the instrument in its original form was valid and effectual, it may be altered, without a fresh stamp, according to the prior contract between the parties.

The plaintiff recovered.

Comyn for the plaintiff.

Marryat for the defendant.

[Attornies, *Gunn and Tilt*.]

(*a*) *Cole v. Parkin*, 12 East, 471. — *vide Cordwell v. Martin*, 1 Campb. 79. *Marlon v. Petit*, 1 Campb. 82. n

ADJOURNED SITTINGS AT WESTMINSTER.

1841.

Thursday,
May 30.

DEAN v. KEATE ESQ.

If upon a hired horse being taken ill, the hirer calls in a farrier, he is not answerable for any mistakes which the latter may commit in the treatment of the horse: but if instead of that he prescribes for the horse himself, and from unskillfulness gives him a medicine which causes his death, although acting *bonâ fide*, he is liable to the owner of the horse as for gross negligence.

THIS was an action for the improper treatment of a horse, let to hire by the plaintiff to the defendant.

The defendant jobbed a pair of coach horses of the plaintiff. One of them being slightly indisposed, the defendant wrote a prescription for him. This medicine was not of itself calculated to do any injury; but after the horse had swallowed it, the defendant put him into harness, gave him strong exercise, and kept him exposed to the inclemency of the weather. In consequence of this treatment, the animal was seized with an inflammation in the intestines. The defendant then, without consulting a veterinary surgeon, very imprudently prescribed a stimulating dose of opium and ginger, and the horse soon after taking it died in great agony. Medical advice was called in when it was too late.

Park for the defendant cited the subjoined case of *Cooper v. Barton* before Mr. JUSTICE LE BLANC; and contended that the action could not be maintained, as the defendant had at most been guilty only of an error in judgment, and had treated the plaintiff's horse exactly

exactly as he would have treated his own. It would be very alarming if those who job horses were answerable for the effect of medicines which it might appear proper to administer to them.

1811
DEAN
v.
KEATE.

Lord ELLENBOROUGH. — The question is, whether the defendant has been guilty of gross negligence with respect to the horse. Had he called in a farrier, he would not have been answerable for the medicines the latter might have administered; but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man towards his own horse, and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff.

The plaintiff had a verdict for 60 guineas.

Garrow and *Best* for the plaintiff.

Park and *A. Moore* for the defendant.

[Attornies, *Stokes* and *Bleasdale*.]

Cooper v. Barton. Lancaster
Lent Assizes, 1810. Cor. LE
BLANC, J.

Assumpsit for not taking pro-
per care of a horse hired by
defendant of plaintiff.

In an action for
not taking
proper care of a
hired horse,
whereby his

knees were broken, the plaintiff must give some positive evidence of negligence; and to prove that the animal was returned by the defendant with his knees broken, although he had often been let out to hire before without having fallen down.

1811.

COOPER
v.
BARTON.

The plaintiff proved the hiring of the horse; that it was returned to him with his knees broken in consequence of a fall whilst used by the defendant, and that the horse had before that time been often let out to hire, and had never fallen down.

Park for the plaintiff contended that this was a sufficient case to go to the jury, although he had given no evidence of negligence, because as he had shewn that the horse was a good horse and not in the habit of falling, it must be presumed that the fall was occasioned by negligence, and it was for the plaintiff to prove the contrary if he could.

LE BLANC, J., however, said that the plaintiff must give *some* evidence of negligence, and as he had given none in this case, the plaintiff must be nonsuited.

In *Coggs v. Bernard*, 2 Ld. Raym. 916, it is laid down by

Lord Holt, "that if goods are let out for a reward, the hirer is bound to the *utmost* diligence, such as the *most diligent* father of a family uses;" and in Bul. N. P. 72, it is said, "that the hirer is to take *all imaginable* care of the goods delivered to hire." According to this doctrine, he would be answerable for *slight* negligence. But on a review of all the authorities upon the subject, it will be found that this extraordinary care is required only of a *borrower*, and that from the true construction of the contract of *locatio conduzio rei*, the hirer is required to use no more than that degree of diligence, which *prudent men*, that is, the *generality of men*, use in keeping *their own* goods. "If *Caius* therefore hire a horse, he is bound to ride it as moderately and treat it as carefully as any man of *common discretion* would ride and treat *his own* horse." See Jones on Bailm. 86.

DOE d. GRIFFIN v. MASON.

1811.

Thursday,
May 30.

EJECTMENT for certain lease-hold premises in *Chandos Street*, brought upon the assignment of a term by the defendant to the lessor of the plaintiff, to secure the payment of an annuity.

an ejectment
upon the assign-
ment of a term
to secure an
annuity, a proper
trial of the
y deeds
will be presumed
till the contrary
is shewn.

A. Moore for the defendant insisted that the lessor of the plaintiff was bound to prove that the annuity had been duly inrolled in pursuance of 17 Geo. 3. c. 26. as this assignment and all the annuity deeds were otherwise utterly null and void.

LORD ELLENBOROUGH. — If the annuity was not duly inrolled, that proof should come from the other side. Here is an assignment executed by the defendant. I will presume it to be valid till the contrary is shewn.

The lessor of the plaintiff had a verdict.

Larves for the lessor of the plaintiff.

A. Moore for the defendant.

[Attornies, *Robins*, & and *Esperbuckler*.]

1811.

DOE d. LEESON v. SAYER.

Thursday
May 30.

The vendor of a term, before the whole of the purchase money is paid, agrees with the purchaser that the latter shall have possession of the premises till a given day, paying the reserved rent in the meantime; and that if he does not pay the residue of the purchase-money on that day, he shall forfeit the instalments already paid and shall not be entitled to an assignment of the lease.—The purchaser being thus put into possession, if the residue of the purchase-money is not paid at the day appointed, the vendor may maintain an ejectment without any notice to quit or demand of possession.

EJECTMENT. Demise laid on 27th March last.

Leeson had bargained with the defendant to sell him the remainder of a term. The defendant had paid part of the purchase-money; but on the 25th of December 1809, 131*l.* remained unpaid. On that day the parties entered into an agreement that the defendant should have possession of the premises till the 24th of June following, paying the reserved rent of 10*6l.* 10*s.* a-year, and that if he did not pay the residue of the purchase-money on or before the said 24th day of June, he should forfeit the instalments already paid, and should not be entitled to an assignment of the lease. In fact the remainder of the purchase-money was never paid.

Jervis insisted for the defendant that under these circumstances he was entitled to some sort of notice to quit, and that having been let into possession by the lessor of the plaintiff, he could not without any notice or demand be treated as a trespasser.—But

Lord ELLENBOROUGH held that the agreement operated in the same manner as a clause of re-entry on a breach of covenant in a lease, and that the defendant's interest in the premises terminated on the 24th of June. His Lordship likewise thought that the circumstance of interest

interest being afterwards received upon the instalments remaining due, was no recognition of the tenancy;—and

1811.

DOE d.
LEESON

v.

SAYER.

The lessor of the plaintiff had a verdict.

Garrow and *Reader* for the lessor of the plaintiff.

Jervis and *Spankie* for the Defendant.

[Attornies, *Fielder* and *Walls*.]

But where the purchaser is put into possession of the premises generally under the agreement to sell, he cannot be ousted by ejectment before notice to quit or demand of possession. Right *d. Lewis v. Beard*, 13 East, 210.

SPENCER v. SMITH.

Friday, May 31

ACTION by the payee against the acceptor of a bill of exchange for 6*l*.

Defence, that the bill was accepted in payment of various small quantities of spirits, each beneath the value of 20*s*. sold by the plaintiff, a publican, to be used out of his house contrary to 24 Geo. 2. c. 40. s. 12.

The defendant was a lieutenant in the 3d York Rangers, and employed in the recruiting service. The spirits, which were the consideration for the bill, had been supplied by the defendant to be used out of his house by recruits and others under the defendant's command. — But,

A bill of exchange accepted by an officer in the recruiting service, in payment of small quantities of spirits under the value of 20*s*. supplied by a publican to be used out of his house by recruits and others under the command of the acceptor, is valid, notwithstanding 24 G. 2. c. 40. s. 12.

1811.

SPENCER

v.

SMITH.

Lord ELLENBOROUGH was of opinion, that the act did not extend to invalidate a security so given, and

The plaintiff had a verdict.

Gaselee for the plaintiff.

Nolan for the defendant.

[Attornies, *Rogers* and *Davis*.]

Inde Jackson v. Attrill, Peak. Caf. 180. *Gilpin v. Rendle*, Selw. N. P. 2d ed. 71.

Saturday, June 1

EVANS v. WINIFRED BIRCH.

Where a servant is in the habit of receiving sums of money for the use of his master, and by the established course of dealing, the servant pays these over to the master from time to time, without any written vouchers passing between them, the presumption of law is, that all sums so received by the servant are regularly

MONEY had and received. — Plea, the general issue.

The plaintiff is a cow-keeper, and had employed the defendant to carry out and sell milk to his customers. The mode in which the business was carried on appeared to be, that the defendant was intrusted with about 20 quarts of milk every morning, for the purpose of serving a milk-walk to which she was appointed: sometimes she sold on credit, and sometimes for ready money: when she returned to the dairy, she was in the habit of accounting with the plaintiff, and paying

paid over to the master: therefore, where there has been such a course of dealing, in an action by the master against the servant for money had and received, it is not enough for the master to prove that sums have been received by the servant to his use; but the *onus* lies upon him to prove by positive evidence, that the servant has not duly accounted with him.

him

him over the money she had received, without any written vouchers passing between them.

1811.

EVANS

v.

BIRCH.

The plaintiff sought to recover the value of the daily quantity of milk delivered to the defendant for the space of two months before she left his service, during which time it was stated she had never accounted with him, or paid him any part of the proceeds of the milk.

Marryat, as his counsel, cited *Longchamp v. Kenny*, Doug. 137, where the defendant being intrusted with a lottery-ticket to sell, and refusing to account for it, Lord Mansfield and the court of K. B. held that a presumption arose that he had sold it, and that he might be compelled to pay the value of it in an action for money had and received. — Two or three of the customers were likewise called, to whom the defendant had sold milk during the two months, and who had paid her ready money for it. The *onus*, it was contended therefore, lay upon her to rebut the presumption that she had sold the milk, and to prove that she had paid over the proceeds to the plaintiff.

LORD ELLENBOROUGH.—I will presume that the milk was sold: but I must further presume that the proceeds were regularly paid over to the plaintiff according to the established course of carrying on the business between the parties. How would it be possible for the defendant to discharge herself, supposing she had daily accounted for all the sums she received? No written memorandum of their dealings was preserved, and she appears frequently to have accounted with him when there was no third person present. Where
such

1811.

EVANS

v.

BIRCH.

such is the course of dealing, the *onus* lies upon the party who says it has been violated, — or the other might be irretrievably ruined. To support the present action, I think you must give some evidence that the defendant has *not* paid over the money to the plaintiff. If in point of fact she has not, and no negative evidence can be adduced, I am afraid his only remedy will be by a bill in equity for a discovery and account ; although this may rather be an expensive mode of settling a milk-score.

It was proved that the defendant had acknowledged she had received 1*s.* 8*d.* which she had not paid over to her master, and for this sum he recovered a verdict.

Marryat for the plaintiff.

Park for the defendant.

[Attornies, *Kinsey* and *Hughes*.]

Vide *Wilson v. Hodges*, 2 East, 312. *Williams v. E. I. Company*, 3 East, 192.

1811.

HART v. SARAH NEWMAN.

Wednesday,
June 5.

ACTION by the payee against the acceptor of a bill of exchange for 27*l*. — Plea the general issue.

The defendant having been proved to have accepted the bill for money lent and house-rent, her counsel offered evidence that after the bill was accepted and had become due, the plaintiff was discharged under the Lords act, and gave in a blank schedule; whereby, it was contended, he had acknowledged that the bill was satisfied.

In an action by the payee of a bill of exchange accepted by the defendant for a valuable consideration, evidence that the plaintiff had been discharged as an insolvent debtor after the bill became due and had given in a blank schedule, is not enough to shew that the bill had been satisfied.

LORD ELLENBOROUGH. — This only shews (what I fear is too often the case) that the schedule of the insolvent was false. The mere omission to insert the bill in his schedule is not enough to prove that the amount was not then due; and we have positive evidence that it was accepted for a full consideration.

Verdict for the plaintiff.

Garrow and *Lawes* for the Plaintiff.

Park for the defendant.

[Attornies, *Stevenson* and *Pinero*.]

Vide Webb v. Fox, 7 T. R. 396.

PRATT

1811.

Thursday,
June 6.PRATT q. t. *v.* FRASER and Another.

It is an offence against 5 Eliz. c. 4. § 31. to employ an unqualified person in any substantial part of a trade within the statute, although he is incapable of doing the more difficult parts of the business, and never finishes any one article.

If a particular trade was carried on in 5 Eliz. it is within the provisions of the above statute, although the mode of carrying it on has been materially altered.

THIS was an action on 5 Eliz. c. 4. §. 31. for setting one *James Stone* on work in the art, mystery, or manual occupation of a book-binder, he the said *James Stone* not having served therein seven years as an apprentice.

It appeared that the defendants had employed *James Stone*, whom they at first took into their service as an errand-boy, for several years past in the easier parts of binding books both in *boards* and in *leather*; but that he was incapable of doing the more difficult parts of the business, and had never finished any one book.

The counsel for the defendant took two objections, 1st, That *Stone*, from merely doing particular parts of the business, could not be said to be set on work within the meaning of the statute, which was to be construed with great strictness; and 2dly, That he had not been proved to do any thing in the business of a book-binder which was usually done in the reign of Elizabeth; for books were then universally bound, not as now in leather or what we call boards, but in real *bona fide* boards of oak or other timber, to fashion and attach which to the sheets of the book was a perfectly different trade from that at present carried on by a needle, scissors and paste. — But

Lord

LORD ELLENBOROUGH held, that to employ an unqualified person in any substantive part of the business was a violation of the statute; and that the business of a book-binder must be considered as known in the time of Elizabeth, and comprehended within the statute, although a difference might since have been introduced into the mode of carrying it on.—His Lordship thought, however, that if Stone had worked at any part of the business seven years before the time mentioned in the declaration, although never bound as an apprentice, the defendants would not have been liable.

1811.
PRATT, q. t.
v.
FRASER
and Another.

The plaintiff had a verdict for one penalty.

Garrow and Lawes for the plaintiff.

Park and Dampier for the defendant.

[Attornies, *Glappetal*, and *Eymont*.]

However, in *Hudson v. Field*, *Sittings after M. T.* 52 Geo. 3. which was an action on 5 Eliz. for setting on work an unqualified person in the trade of a farrier, the evidence being that this person had never assisted in the curing of horses, nor had made any article of iron manufacture, but had only been em-

ployed as *out-door man* in nailing on horseshoes made by others, LORD ELLENBOROUGH was of opinion that this was not a working in the business of a farrier, and directed a nonsuit, which the court of K. B. afterwards refused to set aside.

A person merely employed as *out-door man* to nail on horseshoes made by others, not set on work in the trade of a farrier within the meaning of 5 Eliz. c. 4.

1811.

Friday, June 7.

UHDE v. WALTERS.

In an action on a policy of insurance on a voyage "to any port in the *Baltic*", evidence admitted to prove that the *Gulph of Finland* is considered in mercantile contracts as within the *Baltic*, although the two seas are treated as separate and distinct by geographers.

POLICY of insurance from London to any port in the *Baltic*.

The ship was taken while proceeding to *Reval* in the *Gulph of Finland*.

The counsel for the plaintiff proposed to call witnesses to prove that the *Gulph of Finland* is considered by nautical and commercial men as within the *Baltic*, although the two seas are treated as separate and distinct by geographers.

This was objected to by the counsel for the defendant, who said the written contract must speak for itself, and it might as well be contended that a policy to the *Mediterranean* would protect the ship in sailing to any port in the *Adriatic* or the *Black Sea*.

LORD ELLENBOROUGH.—I know not what the effect of the evidence offered may be; but I think it is clearly competent to the plaintiff to prove that the *Baltic* is *nomen generale*, comprehending in common understanding the gulphs and inlets which communicate with the sea laid down as the *Baltic* in geographical charts. If the *Gulph of Finland* is to be considered as within the *Baltic*, the ship was sailing on the voyage insured at the time of the capture, and there can be no objection to admit evidence as to the understood limits of any particular sea.

Several

Several witnesses were examined who stated that all within the *Sound* is considered as the *Baltic*; that licences meant to protect ships to the *Gulph of Finland* are made out generally to the *Baltic*; and that policies are most usually in the same form, although in *Baltic risks* leave is sometimes expressly given to proceed to ports in the *Gulph of Finland*.

1811.
UNDER
v.
WATERS.

Lord ELLENBOROUGH was of opinion that the evidence was sufficient to establish the point in question, and the plaintiff had a verdict.

The *Attorney General*, *Garrow*, and *Puller* for the plaintiff.

Park, *Topping*, and *Scarlett* for the defendant.

[Attornies, *Crawder* and *Reardon*.]

BAIKIE ESQ. v. CHANDLESS, GENT. ONE, &c.

Saturday,
June 8.

THIS was an action against the defendant for negligence in the purchase of an annuity for the plaintiff.

An attorney employed to purchase and prepare the assignment of an annuity before the decision holding that the trusts in the annuity deeds must be particularly set forth

The declaration stated that in consideration that the plaintiff had retained the defendant to investigate and

in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchased was void because the memorial omitted particularly to specify the trusts of the annuity deed.

1811.
 BAIRIE
 v.
 CHANDLESS.

ascertain the validity of a certain annuity, the defendant undertook to perform his duty in and about the premises; and although he afterwards caused and procured the plaintiff to accept an assignment of the said annuity, and to pay 216*l.* for the purchase thereof, and it thereupon became and was his duty to take due care in ascertaining that a sufficient memorial of the said annuity had been and was duly inrolled according to the form, effect and exigency of the statute in such case made and provided; yet that he did not do so, and that for want of a sufficient memorial of the said annuity having been inrolled as aforesaid, the said annuity was wholly invalid.

The annuity in question of 35*l.* was granted on the 26th of June 1792, by the Honourable General John Leslie, to one George Wilson during the life of the grantor. General Leslie assigned his pay as an officer in the guards, in trust to secure the payment of the annuity, and to dispose of the surplus for other purposes. There was a memorial of the annuity inrolled in due time, but it did not state particularly the trusts for which the pay was assigned. The present defendant was the trustee, and the grant of the annuity had been negotiated through his agency. In the same year Wilson the grantee wished to sell, and the defendant advised the plaintiff to become the purchaser. In consequence, by deeds which the defendant prepared, the annuity was assigned to the plaintiff for the sum of 216*l.*—For 14 years the annuity was regularly paid; but at the end of that time the grantor refused to pay it any longer; and an action being afterwards

brought for the arrears in the court of C. P. the annuity was held to be void for want of a proper memorial.

1811.
BAIKIE
v.
CHANDLESS.

Garrow, for the plaintiff, referred to *Toldervy v. Allan*, 5 T. R. 480. *Denn d. Dolman v. Dolman*, 5 T. R. 641. and *Askew v. Mackreth*, 1 N. R. 214. in which it had been decided that the memorial must particularly disclose the trusts upon which property is assigned to secure payment of the annuity, and contended that the defendant was liable to the plaintiff for not discovering the defect in the memorial in question, by which the annuity was invalidated.

The *Attorney General*, contra, cited a case of *Compton v. Chandless* tried before Le Blanc, J. sitting for Lord Kenyon at Westminster in 1802, which was an action against the same defendant for negligence in respect to another annuity which had been set aside for the very same defect in the memorial. Mr. Justice Le Blanc there observed " that it was not every neglect that would subject a man to such an action ; that an attorney was only bound to use reasonable care and skill in managing the business of his client ; that if he were liable further, no man would venture to act in that capacity ; that in the year 1787, the date of that annuity, it was not known that these trusts ought to be stated ; that it might appear to a reader of the act at that time, not to have been necessary ; that courts of justice had held otherwise since, seeking to give full effect to the spirit of the act ; but that the memorial, considering the date of it, was drawn with as much

1811. consideration and skill as could be reasonably expected
 BAIRIE from a professional man ;"—and accordingly there was
 v. a verdict for the defendant. Mr. *Attorney* said, he had
 CHANDLESS. no hesitation in declaring that if he had been consulted
 before the decision of the cases referred to, he should
 without difficulty have given it as his opinion that a
 memorial in this form was a sufficient compliance with
 the act of parliament.

Lord ELLENBOROUGH.—An attorney is only liable
 for *crassa negligentia* ; and it is impossible to impute
 that to the defendant for not discovering a defect in
 the memorial of an annuity which was subsequently
 held to be a defect upon a very doubtful construction
 of the statute. I will adhere to the cases cited, as they
 have been determined and acted upon ; but I am not
 prepared to say that I should have originally concurred
 in them. The grant and assignment of this annuity
 however were prior to all these cases, and at that time
 the memorial in its actual form might, without any
 culpable negligence, be considered quite sufficient. I
 perfectly agree in the observations made on a similar
 occasion by my brother *Le Blanc*, and I am of opinion
 that the present action cannot be maintained.

Plaintiff nonsuited.

In an action
 against an at-
 torney for negli-
 gence in respect
 to the memorial
 of an annuity
 which he had
 prepared and carried in to be enrolled, an examined copy of the roll is *prima facie* evidence of the
 original memorial.

In proving the plaintiff's case a copy of the memo-
 rial was offered in evidence, which a witness had ex-
 amined with the *inrolment* at the *Rolls*.

The

The *Attorney General* objected, that the plaintiff ought to produce a copy examined by the original memorial carried in to be inrolled by the defendant, for which alone he was answerable.

1811.
BAIRIE
v.
CHANDLESS.

LORD ELLENBOROUGH. — A copy examined by the roll is *prima facie* sufficient. The act of parliament requires the memorial carried in to be inrolled correctly, and I must presume that those concerned do their duty under the act. The inrolment is a sort of statuteable record, and an examined copy of it is admissible. The defendant, if he pleases, may prove that he carried in another and a perfect memorial which has been miscopied.

Garrow, Jervis, and Barrow, for the plaintiff.

The *Attorney General* and *Richardson* for the defendant.

[Attornies, *Tuckey* and *Gbandlesi*]

In this case there was a plea of *assio non accrevit infra sex annos*.—Q. From what time would the statute of limitations have begun to run? *Vide* *Peck v. Ambler*, 15 Vin. 110. Jo. 330.

As to the responsibility of attornies, *vide* *Russell v. Palmer*, 2 Will. 325. *Pitt v. Yalden*, 4 Burr. 2060.

 ADJOURNED SITTINGS IN LONDON.

1811.

Tuesday,
June 11.

METCALFE v. SHAW,

ACTION on a promissory note, and for goods sold and delivered. — Plea, the general issue.

If wearing apparel is supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which the credit is given to her, and her promissory note is taken in payment, the husband is not liable for any part of the goods, and in an action against him for their value, is not bound to prove that his wife was supplied with suitable wearing apparel from any other quarter.

The plaintiff, a milliner, supplied articles of dress to the wife of the defendant, who is an apothecary in a small country-town, in the course of six months to the amount of nearly 200*l*. The defendant and his wife were then living together, but there was no evidence whatever that he was at all aware that she had any dealings with the plaintiff. A former account of the same sort that she had with the plaintiff without her husband's knowledge had been paid by her father, who requested that no farther credit should be given to her without her husband's sanction. All the goods in question were subsequently ordered by her alone, and the plaintiff took the promissory note declared upon, for the amount, from her in her own name.

Garrow for the plaintiff contended, that although the defendant might not be liable on the note, nor for the whole of the goods, there must be a verdict against him for such part of them as the jury should think suitable to his circumstances and degree. The notice not to trust his wife, not coming from him, could be
of

of no avail in point of law, and he had not proved that she was furnished with proper apparel from any other quarter.

1811.
MELCALFE
v.
SHAW.

• Lord ELLENBOROUGH. — The action clearly cannot be maintained on the promissory note, as the wife had no authority general or special from her husband as his agent to make it; and I think he is not liable for any part of the goods, on this plain ground, that they were not supplied on his credit, and the plaintiff looked to the wife only for payment. The credit was given to the wife, not to the husband.

Plaintiff nonsuited.

Garrow and *Richardson* for the plaintiff.

Topping and *Raine* for the defendant.

[Attornies, *Barber* and *Exley*.]

Vide 1 Campb. 120.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Trinity Term.

51 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

1811.

Thursday,
July 4.

ROTHEREY v. WOOD AND ATKINS, ESQRS.

If upon the goods
of a tenant being
taken in execution,
an agent of
the landlord

THIS was an action against the Sheriff of Middlesex
on stat. 8 Ann. c. 14. § 1. (a) for not reserving and
paying
takes from the sheriff's officers an undertaking for a year's rent, and then consents to the goods being
sold, the landlord cannot afterwards maintain an action against the sheriff on 8 Ann. c. 11. § 1. for not
paying a year's rent on making the levy; although the rent is not paid according to the undertaking, and
although the undertaking should be void under the statute of frauds for not stating any consideration.

(a) The statute enacts, that the party at whose suit the said
“no goods or chattels whatsoever execution is sued out, shall, before the removal of such goods
lying or being in or upon any from off the said premises, by
messuage or lands which are or virtue of such execution or extent,
shall be leased for life or lives, pay to the landlord of the
term of years, at will, or otherwise, shall be liable to be taken
by virtue of any execution, on such sum or sums of money as
any pretence whatsoever; unless are or shall be due for rent for
the

paying over to the plaintiff a year's rent on taking in execution the goods and chattels of one *James Clarkson* the plaintiff's tenant.

1811.
ROTHEREY
v.
WOOD
and Another.

It appeared that when the levy was made there was a year's rent amounting to 5*2*l. in arrear, of which the Sheriff had regular notice from the plaintiff's agent; but that this same agent accepted from the Sheriff's bailiff and auctioneer a written undertaking in the following form:

"We undertake to pay Mr. Rotherey one twelve-month's rent for the premises occupied by Mr. Clarkson, if so much rent appears to be due.

"Feb. 5th, 1810.

"JOHN WILSON.

"THOMAS BARNETT."

The sale of the goods then went on with the consent of the plaintiff's agent; but the arrears of rent have never yet been paid to the plaintiff.

Park for the plaintiff contended, that it was peremptory upon the Sheriff to pay over the arrears of rent to the landlord; that the acceptance of the written undertaking could at most amount to a conditional waiver of the landlord's right; and that as the money had not been paid, he might maintain his action for the

the said premises at the time of taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent."

1811.

ROTHEREY

v.

WOOD
and Another.

tort which the Sheriff had committed in taking the goods in execution without paying the rent.

LORD ELLENBOROUGH. —I am of opinion that you have completely waived the benefit of the statute. The Sheriff committed no tort in taking the goods in execution without first paying the rent, as he did so with your consent. You must now proceed upon the undertaking ; and whether or not the consideration is sufficiently expressed on the face of it, so as to render it available, is immaterial ; for be it valid or invalid as a contract, it is a clear justification to the Sheriff. In future, it will be better for landlords to have their rent before they suffer their tenant's goods to be sold in execution ; but if they will give trust, they cannot afterwards resort to an action on this statute against the Sheriff.

Plaintiff nonsuited.

Park and Littledale for the plaintiff.

Garrow and Comyn for the defendant.

See the cases upon this subject all collected, Tidd. Prac. 915, 6. 4th ed.

CLAYTON ESQ. v. HUNT.

1811:
 Thursday, July 4.

THIS was an action against a carrier for the loss of a box filled with wearing apparel of the value of 21*l.* intrusted to him to be carried from Oxford to London.

The plaintiff was a student of University College, and the box in question was delivered into a cart of the defendant's sent round to different parts of Oxford to receive goods for the waggon.

The answer to the action was, that the defendant had given notice that he would not be liable for any package above the value of 5*l.* unless an insurance was paid upon it. A printed bill containing a notice to this effect was stuck up at the office in Oxford, where the business of the waggon is transacted: cards of a similar purport had been circulated about the town: an advertisement to the same effect had been published in the Oxford newspapers: but there was no notice on the cart which went round to receive the goods, and there was no evidence that any of the cards had ever been seen by the plaintiff, or that he read any newspaper containing the advertisement.

If a carrier receive goods at a distance from his office,—to be discharged from his common law liability, he must prove that the special terms on which he deals were communicated to the owner of the goods through some other medium than a notice stuck up in the office; and that to be of any avail must be in such large characters that a person delivering goods at the office cannot fail to read it without gross negligence.

The

1811.

CLAYTON

v.

HUNT.

Lord ELLENBOROUGH held that the defendant in this case had not discharged himself from his common law liability, and

The plaintiff had a verdict for 21*l*.

In the ensuing term the Court refused a rule to shew cause why there should not be a new trial in this case, saying that the notice in the office ought to be in such large characters that no person delivering goods there can fail to read it without gross negligence, and that if a carrier's servant receives goods at a distance from the office, the special terms on which he deals ought to be communicated through some other medium.

Park and *Littledale* for the plaintiff.

Garrow and *Comyn* for the defendant.

Vide Cobden v. Bolton, 2 Campb. 108. Butler v. Heane, 2 Campb. 415.

COR. BAYLEY J.
BOUGHTON v. FRERE.

1811.

Saturday, July 6.

THE plaintiff declared in the name of *Edward Boughton* upon a bill of exchange drawn by him, payable to his own order, and accepted by the defendant. The common money counts followed.—Plea, the general issue.

If the plaintiff declares by a wrong christian name, this is no ground of nonsuit at the trial, if it can be shewn that the defendant knew that the action was brought by the person who actually sued.

It appeared that the plaintiff's real name was *Edmund*, and that in that name he had drawn the bill of exchange.

The defendant's counsel insisted that this was a ground of nonsuit, as the bill was misdescribed in the first count, and that with respect to the money counts, the bill was evidence of money had and received by the defendant to the use of *Edmund* not *Edward Boughton*, or of an account stated with *Edmund* not *Edward Boughton*.

On the other side it was maintained that the defendant ought to have pleaded the misnomer in abatement, if he meant to take advantage of it, and that the only inquiry now was, whether there had been any contract such as those described in the declaration between the actual parties to the suit, without considering by what names they were designated in the pleadings.

1811.
BOUGHTON.
v.
FREE.

BAYLEY J. thought it would be enough to shew that the bill was drawn by the plaintiff, and that the defendant knew by whom the action was brought.

These circumstances were accordingly proved, and the plaintiff had a verdict.

Garrow and *Abbott* for the plaintiff.

Park for the defendant.

[Attornies, *Meakings* and *Jeyes*.]

Vide Mayor and Burgesses of Stafford v. Bolton, 1 Bof. and Pulb. 40.

Tuesday, July 9. COLLINSON AND ANOTHER, ASSIGNEES OF NEWMAN,
A BANKRUPT, v. HILLEAR.

To render the proceedings under a commission of bankrupt evidence pursuant to Sir Samuel Romilly's act, it is enough to shew that they are produced from the custody of the solicitor to the commission, or to prove the hand-writing of one of the commissioners before whom they were taken.

IN this case no notice had been given under Sir Samuel Romilly's act, that the trading, act of bankruptcy, or petitioning creditor's debt was disputed.

The plaintiff's counsel therefore put in the proceedings under the commission.

Park for the defendant insisted that before the depositions could be read, they must be proved to have been subscribed by the persons making them, by some person

person who was present when they were taken before the commissioners.

1811.
COLLINSON
and another
v.
HILLIAR.

LORD ELLENBOROUGH. — I shall hold it sufficient to shew that the proceedings come out of the proper custody, viz. that of the solicitor to the commission.

In this case, however, the solicitor had been changed, and it could not be proved that the proceedings put in had been handed over by him to the person now producing them.

LORD ELLENBOROUGH. — Some further evidence must be given that these depositions were taken under the commission; but I shall consider it enough to prove the signature of one of the commissioners.

This was done accordingly, and the cause proceeded.

Garrow and *Marryat* for the plaintiffs.

Park for the defendant.

[Attornies, *Vine* and *Tilbury*.]

1811:

Tuesday,
July 9.

HALLIDAY v. WARD THE ELDER.

In an action against A. on the joint and several promissory note of himself and B. to take the case out of the statute of limitations, it is enough to give in evidence a letter written by A. to B. within the six years, desiring him to settle the money.

ACTION on a joint and several promissory note drawn in the year 1805 by the defendant and his son. — Plea, *actio non accrevit infra sex annos*.

To take the case out of the statute, the plaintiff gave in evidence a letter written by the defendant, who is a quaker residing in London, to his son in the country, within the six years, containing the following expressions in allusion to the note:

“ With regard to *Halliday's* money, thou must settle it thyself. The money here will be all employed in the business, if carried on with spirit.”

Park for the defendant contended that this was insufficient, as it did not amount to a promise to pay, and was not even addressed to the plaintiff, but merely called upon another person to settle the money.

LORD ELLENBOROUGH.—This letter acknowledges the existence of the debt within the six years, and the promise to pay is implied by the law.

The plaintiff had a verdict.

Garroze

Garrow and *Hullock* for the plaintiff,

Park for the defendant.

[Attornies, *Williams* and *Fisher*.]

1811.

HALLIDAY
v.
WARD.

See all the cases upon this point collected Selw. N. P. 151
152, 3. 2d ed.

PITT v. SMITH.

Wednesday,
July 10. .

THE declaration stated, that a certain agreement was entered into between the plaintiff as an agent, and the defendant, for the sale of an estate; and that the defendant afterwards published a libel concerning the plaintiff, alleging that he had induced the defendant to execute this agreement when in a state of intoxication.

An agreement signed by a person in a state of complete intoxication is void.

Plea, the *general issue*.

The attesting witness to the agreement being called, he was asked in cross-examination, whether the defendant was not actually in a state of complete intoxication when he executed the agreement.

The plaintiff's counsel insisted that this question was irregular, there being no justification on the record.

1811.

PITT
v.
SMITH.

Lord ELLENBOROUGH.—You have alleged that there was *an agreement* between the parties; and this allegation you must prove, as it is put in issue by the plea of *not guilty*: but there was no agreement between the parties, if the defendant was intoxicated in the manner supposed when he signed this paper. He had not an agreeing mind.—Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise (a):

It appeared that the defendant had become quite drunk in the company of the plaintiff before signing the agreement. Whereupon Lord ELLENBOROUGH directed a nonsuit, which the court of K. B. in the ensuing term refused to set aside.

Brougham and *E. Lawes* for the plaintiff.

Garrow for the defendant.

[Attornies, *Vincent* and *Hanfon*.]

(a) *Cole v. Robins*, Bul. N. P. 172.

But it seems to have been held in one case, that the mere circumstance of having been in drink, is not sufficient to avoid a deed or agreement executed under these circumstances; and that for this purpose, it is necessary to prove that through the management or contrivance of him who gained the deed or agreement, the party was drawn

in to drink. *Johnson v. Medlicott*, 3 P. Wms. 130.

In writers on the law of Scotland, the doctrine is laid down without any qualification; and drunkenness, however produced, is considered as avoiding contracts on the same ground as insanity.

“ Persons while in a state of
“ absolute drunkenness and con-
“ sequently deprived of the ex-
“ ercise of reason, cannot oblige
“ themselves;

“ themselves : but a lesser de- “ the granter is incapable of
 “ gree of drunkenness which “ consent, for the law has
 “ only darkens reason, has not “ thought it equitable to pro-
 “ the effect of annulling the “ test those who have not the
 “ contract.” *Stair*, July 29th. “ use of their reason (*even*
 “ 1672. *Lord Hatton*. “ though they should have lost
 “ An obligation granted by “ it by their own folly) from
 “ a person while he is in a state “ the fraud or circumvention of
 “ of absolute and total drunk- “ others.” *Erlk. Inst.* 814, 5.
 “ enness is ineffectual, because

1811.
 PITT
 v.
 SMITH.

AARON v. ALEXANDER, CROWLEY and SOLOMONS. Wednesday, July 10.

TRESPASS and false imprisonment. Pleas *not guilty*, and a justification under a warrant granted by Mr. JUSTICE BAYLEY upon an indictment found at the Middlesex Sessions for an assault. *

The keeper of a prison who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant having been executed against the proper person; and though acting *bonâ fide*, and without the means of ascertaining the identity of the individual named in the warrant, he is liable to an action of trespass and false

It appeared that the plaintiff was not the person against whom the indictment was found; and that being apprehended through mistake by *Alexander* and *Crowley*, they brought him to a watch-house kept by the defendant *Solomons*, who was acting as a constable, — where he was detained the whole night. The next morning *Alexander* and *Crowley* carried him before Mr. JUSTICE GROSE; but there being a dispute as to

imprisonment, if by the mistake of the officer to whom it was directed, it was executed against another.

In trespass and false imprisonment against several, where one acquitted, certificate granted under 8 & 9 W. 3. c. 11. to deprive him of his costs.

1811.

AARON

v.

ALEX-
ANDER,
and Others.

his identity, the learned Judge refused to interfere, and he was some time afterwards set at liberty.

It was first contended that *Solomons* the constable and watch-house-keeper could not be liable in this action, as he was bound to receive the plaintiff when charged in his custody under the Judge's warrant.

LORD ELLENBOROUGH.—I think *Solomons* was in point of law a trespasser, although he had no means of knowing the person of the individual named in the warrant.

However, as *Solomons* had not been concerned in those acts of which the plaintiff principally complained, LORD ELLENBOROUGH said, that the attention of the jury must either be confined to the imprisonment in the watch-house, or there must be a verdict in favour of *Solomons*.

The latter alternative being preferred, there was a verdict only against *Alexander* and *Crowley*.

The plaintiff's counsel then applied for a certificate under 8 & 9 W. 3. c. 11. that there was a reasonable cause for making *Solomons* a defendant, for the purpose of depriving him of his costs. It was contended on the other side, that this could not be done under the circumstances of the case.

LORD ELLENBOROUGH, after referring to the statute, granted the certificate.

Park

Park and *Marryat* for the plaintiff.

Garrow and *Andrews* for the defendants.

[Attornies, *Harris* and *Allen*.]

1811.

AARON

v.

ALEX-

ANDER,

and Others.

CLARK v. MUMFORD.

Wednesday
July 10.

INDEBITATUS assumpsit for work, labour, and materials.

The action was brought on a farrier's bill, for attendances on two horses of the plaintiff and medicines administered to them.

Garrow contended that the plaintiff could not recover upon such a count, which conveyed no information of the nature of his demand; and that at any rate the medicines must be considered as *goods sold* to the defendant, and ought to have been declared for accordingly.

LORD ELLENBOROUGH. — Any species of work and labour may be given in evidence under such a general count; and the medicines here may be considered *materials* employed by the plaintiff in and about the business of the defendant.

The plaintiff had a verdict for his whole demand.

Under a general count in indebitatus assumpsit for work, labour and materials, the plaintiff may recover for attendances as a farrier and for medicines administered in the cure of the defendant's horses.

1811. *Park and Marryat* for the plaintiff.

CLARK
v.

MUMFORD.

Garrow and E. Lawes for the defendant.

[Attornies, *Cunningham and Greenbill.*]

I have thought that this decision may be of some use to the profession, although the point was not before thought doubtful among gentlemen at the bar. But in cases of this sort it is not unusual to find at least *ten* counts in the declaration—*two* for work and labour as a farrier, &c.—*two* for work and labour generally—*two* for goods fold and delivered—and the *four money counts*, not

omitting *money lent*, which can never be of any use except where there is the specific contract of the lending and borrowing of money.—If a declaration contains *general* and *special* counts for work and labour, the court on motion will order one set to be struck out as superfluous. *Mecke v. Oxlade*, 1 New Rep. 289.

Thursday,
July 11.

MOGGRIDGE v. JONES.

Where under an agreement between A. and B. for the sale of a lease, B. accepts a bill for the purchase money, and is let into possession of the premises, it is no defence to an action by A. against B. upon the bill, that A. refused to execute an assignment of the lease according to the agreement.

THIS was an action by the payee against the acceptor of a bill of exchange for 200*l.* dated 20th July 1810, payable 8 months after date.

On the above day the parties entered into an agreement for the sale of the lease of a house, for which the defendant was to pay the plaintiff the sum of 500*l.* by 3 bills of exchange at eight, eleven, and fourteen months.—The bill in question, together with two others,

others, making up the 500*l.* were accordingly accepted by the defendant, and he was let into possession of the premises ; but the plaintiff refused to grant the lease in pursuance of the agreement.

1811.
MOGGRIDGE
v
JONES.

Garrow for the defendant, contended that the consideration for the acceptance of the bill had failed, and that the action therefore could not be maintained.

LORD ELLENBOROUGH.—There was originally an ample consideration for this bill of exchange, and it has not completely failed, as the defendant has continued in possession of the premises. He cannot say under these circumstances, that the agreement is entirely rescinded. He must pay the bills and bring his cross-action on the agreement, or go into equity for a specific performance.

The plaintiff had a verdict, which in the following term *Garrow* moved to set aside ; but the Court of K. B. refused a rule to shew cause.

Park and ——— for the plaintiff.

Garrow and *Wylde* for the defendant.

[Attornies, *Rogers* and *Wilde*.]

Vide Morgan v. Richardson, 1 Campb. 40. n. *Tye v. Gwynne*, 2 Campb. 346.

1811.

Thursday,
July 11.

ISRAEL v. BENJAMIN.

In an action on a bill of exchange, after payment of money into court, the defendant cannot object to the sufficiency of the stamp on which the bill is drawn.

Q Whether a 2s. stamp be sufficient for a bill for "50l. with all legal interest."

THIS was an action against the defendant as acceptor of a bill of exchange drawn by the plaintiff in the following words :

" Two months after date pay to me or my order 50l. sterling with all legal interest for the same."

The bill had a 2s. stamp applicable to bills above 30l. and not exceeding 50l.

The defendant had paid 20l. into court upon the whole declaration.

Garrow for the defendant, contended that the stamp was insufficient, as the bill was to carry interest from the date of it, and therefore a larger sum was payable upon it than 50l.

LORD ELLENBOROUGH. — The defendant is precluded from taking this objection by the payment of money into court, which admits the validity of the instrument. — His Lordship was likewise inclined to think the stamp sufficient, as there was no interest due when the bill was drawn, as it was then a security for the sum of 50l. and no more, and as there is always interest to be recovered if the bill is not paid the day it becomes due.

Verdict for the plaintiff.

Garrow

Garrow moved in the ensuing term for a new trial in this cause, on the same ground he had taken at nisi prius. — The Court gave no opinion as to the sufficiency of the stamp; but clearly thought that the objection could not be taken after the payment of money into court.

1811.

ISRAEL

v.

BENJAMIN.

The plaintiff's counsel at the trial to prove the payment of money into court, first proposed to examine the attorney who had taken it out of court.

LORD ELLENBOROUGH. — You must produce the rule for paying the money into court. This is the only regular way in which I can know on what counts it was paid in, or give any effect to it.

Payment of money into court, can only be proved by the rule for paying it in.

Topping and *Marryat* for the plaintiff.

Garrow and *Nolan* for the defendant.

[Attornies, *Williamson* and *Aspinall*.]

ATKINSON v. DICKINSON.

1811.

Thursday,
July 11.

COPLET prayed for leave to make a motion in this cause, which he said was entered for trial at the adjourned sittings in *London*.

A Judge sitting at nisi prius at Westminster cannot upon motion make an order in a cause entered for trial in London.

Lord

LORD ELLENBOROUGH.—Sitting here at *nisi prius*, I have no jurisdiction respecting a cause to be tried in London. The motion should have been made to the court in term time, or must be postponed till I am sitting at *nisi prius* in *London*. In the mean time, I may be applied to at chambers to make an order upon a summons: but I am now sitting under a commission of *nisi prius* for the county of Middlesex; and I cannot upon motion make an order of *nisi prius* in a cause entered for trial in the city of *London*.

Antiently all causes in Middlesex were tried at bar. But this, from the increase of business having been found extremely inconvenient, it was enacted by 18 Eliz. c. 12., that the Chief Justice of England, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, or in their absence two puisne judges of their respective courts, within term time, or four days next after the end of every term, might try in Westminster Hall all manner of issues which ought to be tried in any of the said courts by an inquest of the said county of Middlesex; and that commissions and writs of *nisi prius* should be awarded in such cases as had been used in any other shire of

the realm. — Two puisne judges were required to sit at *nisi prius* in Middlesex, in the absence of the Chief Justices or Chief Baron till 12 Geo. 1. c. 31., by which it was provided that any one judge of the several courts of record in Westminster Hall, might try causes in the manner prescribed by 18 Eliz. c. 12.; and the time was extended to the space of *eight* days after the end of every term. By a subsequent statute, 24 Geo. 2. c. 18. s. 5., this time is still further extended to *fourteen* days.—In London trials at *nisi prius* take place by immemorial custom, and the judges sit at Guildhall when and as long as the exigency of business requires.

 ADJOURNED SITTINGS IN LONDON.

DIPLOCK and Others, Executors, &c. OF HENDERSON *v.* BLACKBURN.

1811.

 Friday,
July 19.

THIS was an action of indebitatus assumpsit to recover the balance of an account.

The only question between the parties was, whether the defendant had a right to take credit for a sum of 134*l.* under the following circumstances :

The testator who commanded a ship of which the defendant was owner, when at the Cape of Good Hope had occasion to draw a bill upon England on account of the ship for about 1500*l.* From the state of the exchange at that time, he received as a premium for this bill the sum of money in dispute.

If the master of a ship in a foreign port, from the state of the exchange receives a premium for a bill drawn upon England on account of the ship, this belongs to his owner, although there may have been a usage for masters of ships to appropriate such premiums to their own use.

Park for the plaintiffs, contended that the 134*l.* belonged to the testator, and offered to call witnesses to prove that it is usual for the captain of a ship under these circumstances to be allowed for his own benefit any advantage arising from the state of the exchange.

LORD ELLENBOROUGH.—I am clearly of opinion that this premium belonged to the owner and not to the

1811. the captain. If a contrary usage has prevailed, it has been a usage of fraud and plunder. What pretence can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty. I believe that in this very way, servants of the public abroad have been guilty of enormous speculation. The testator was undoubtedly bound to debit himself for the 134*l.* as much as for any other sum of money he received on the defendant's account.

DIPLOCK
and others

v.
BLACK-
BURN.

Plaintiffs nonsuited.

Park and Gaslee for the plaintiffs.

Garrow and Campbell for the defendant.

[Attornies, *Bageley and Nind.*]

See the cases upon this subject collected in a late valuable publication, *Paley's Law of Principal and Agent.* p. 41.

JOHNSON v. MACHIELSNE.

If foreign sailors stipulate in their own country before the commencement of a voyage, that they will not sue the captain for any money abroad, but be satisfied with what he may advance them in deduction of their wages till they return home, they cannot maintain an action against him for wages, in the courts of this country.

ACTION for seamen's wages alleged to have been earned on board a Papenburgh ship called the

Waak-

Waakzaamheid, of which the defendant was master, in a voyage from *Gottenburgh* to *London*.

1811.

JOHNSON

The ship was seized by an English cruizer, and sequestered in the Court of Admiralty; but afterwards restored.

MACHIEL-SEN.

The defence was rested on the third article of the agreement, signed by the plaintiff and the other mariners belonging to this ship before the commencement of the voyage :

III. " That they would not in foreign parts prosecute payment of any money whatever of the captain, but be satisfied with what he might be pleased to advance them abroad in deduction of their wages,"

Topping for the plaintiff, contended that this was no bar to the present action. The parties by their private agreement could not oust the jurisdiction of our courts. The plaintiff might be liable in his own country for suing here; but the only thing to be considered in this cause was, whether the wages were due. The agreement, besides, was made abroad, and could not be enforced in this country.

LORD ELLENBOROUGH. — If this were merely the regulation of a foreign government, I should leave that government to enforce it by punishing the infraction of it, or by any other means that might be more effectual. But by the personal contract between the individuals before the court, it is expressly stipulated

1811.

JOHNSON

v.

MASHIEL-

lated that the mariners shall not sue the captain for wages in foreign parts. It is impossible for me to say that this stipulation is void. There may be great reason for protecting the captain from suits in foreign countries, where he may have no funds to answer the demands of the mariners; and it may be conducive to the interests of commerce that the mariners should have the strongest inducement to remain in the ship till the adventure is completed. The rate of wages might be in part determined by the condition that they were not demandable till the ship's return home. The agreement was made abroad; but it is transitory; and we are bound as far as we are able to give it the same construction and effect which it would receive in the country where it was made.

The cause was afterwards referred.

Topping and Espinasse for the plaintiff.

Garrow and Copley for the defendant.

[Attornies, *Rippingham* and *Willetts*.]

Vide *Gienar v. Meyer*, 2 H. Bl. 603. *Hulle v. Heitman*, Abb. Shipp. P. IV. C. II. § 7.

DELVALLE

1811.

DELVALLE v. PLOMER, Knt., and Another.

Monday,
July 22.

THIS was an action against the Sheriff of Middlesex for a false return of *nulla bona* to a writ of *feri facias* sued out upon a judgment against one *Martha Lyalle*.

It is not a sufficient justification to the Sheriff for refusing to execute process, that the individual against whose person or goods it issues has the appointment of domestic servant to a foreign minister at our court, and that notice of this has been stuck up at the Sheriff's office, unless the appointment be *bonâ fide*; and in an action against the Sheriff for a false return, the plaintiff may shew that the appointment was merely colourable.

It was proved that between the teste and return of the writ, Mrs. *Lyalle* had household furniture and other property in her possession, within the defendants' bailiwick, more than sufficient to satisfy the debt.

The defence was, that she was *housekeeper* to the public Minister at our Court from the Prince of Hesse, and that her goods were therefore privileged from being taken in execution, under stat. 7 Ann. c. 12. by which it is provided that "all writs and process against
" the person or goods of an ambassador, or other
" public minister of a foreign prince or state, or the
" *domestic servant* of such ambassador or public minister, shall be utterly null and void to all intents
" and purposes whatsoever."

In support of this, the defendants gave in evidence a certificate from the Secretary of State's office, that the person therein named is the public Minister at our Court from the Prince of Hesse,—a written appointment from this person constituting Mrs. *Lyalle* his housekeeper,—and a notice stuck up in the Sheriff's office, intimat-

1811. intimating that she was one of the Hessian Minister's
 DELVALLE domestic servants.

v.
 PLOMER
 and Another.

The plaintiff's counsel proposed to prove in reply, that this was colourable and fraudulent; and that at the period in question Mrs. *Lyalle* kept a common boarding-house, and was a dealer in coals.

On the part of the defendants, it was denied that this inquiry could be gone into in the present action. The Sheriffs were bound by the appointment of Mrs. *Lyalle* as the ambassador's housekeeper, and the notice stuck up in their office. They might be expected to inquire who the person was that granted the appointment: they had done so at the Secretary of State's office, and found he was recognized by our government as the ambassador of a Sovereign Prince. It was impossible for them to go farther, or to investigate what particular services were rendered by this lady to His Excellency.

LORD ELLENBOROUGH. — I think it is a fact now to be tried whether *Martha Lyalle* really was a servant to this public minister? If she was not, the appointment and notice are mere nullities, and her goods ought to have been taken in execution according to the exigency of the writ. The Sheriffs might have known that she was not the domestic servant of any one, if she was publicly keeping a boarding house on her own account; and at any rate, this is one among many other questions which Sheriffs in the execution of process must determine at their own peril. In cases
 of

of real difficulty they may call for an indemnity, and the Court will enlarge the time for their making their return till an indemnity is given (a). The provision that *traders* shall not be protected by the statute, peculiarly shews the necessity of tracing the real character of the supposed domestic servant in an action of this sort.

1811.
 DELVALLE
 v.
 PLOMER
 and Another.

It was satisfactorily proved that *Mrs. Lyalle* at the period in question, did keep a boarding house on her own account, and was a dealer in coals.

The plaintiff had a verdict.

Garrow and *Lawes* for the plaintiff.

Park and *Comyn* for the defendants.

[Attornies, *Pearse* and *Smith*.]

(a) In this very case the Sheriffs had been indemnified before they returned *nulla bona*.

FORSTER v. TAYLOR GENT. ONE, &c.

Monday,
 July 22.

THIS was an action by the landlord of the *Three Tons* Tavern in the Borough of Southwark, for a dinner

maintaining the jury summoned to assess the value of property taken under the act, this does not extend to a dinner at a tavern given to the jury after delivering in their verdict.

Where a party of several persons dine together at a tavern, they are jointly liable for the whole expence, and not merely each for his own share.

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furnished

Where a private act of parliament provides for the expence of

1811.

FORSTER

v.

TAYLOR.

furnished by him to the Jury summoned to assess the value of property under a private act of parliament, and eaten by them after they had delivered their verdict.

The plaintiff at first rested his case upon the words of the act, by which it is provided that the expence of *maintaining the jury* shall be borne in a particular manner which would have made the defendant liable as attorney for one of the parties. The counsel stated that it was the constant practice upon such occasions to provide a dinner for the jury after the business was over; and it was often pointed out in these acts of parliament by whom the expence should be borne. — But

Lord ELLENBOROUGH was of opinion that the words could not be extended to a dinner of this sort, and that the legislature could not be understood to have sanctioned a system of junketing among jurymen.

It appearing, however, that the defendant's clerks, by his permission, had partaken of the dinner;—

Lord ELLENBOROUGH thought that this made him liable; and that the undertaking being joint, and there being no plea in abatement, he was liable for the whole.

The plaintiff therefore had a verdict for the amount of his bill.

Park and Nolan for the plaintiff.

Garrow, and D. Pollock for the defendant.

[Attornies, *Alcock and Taylor.*]

1811.

FORSTER
v.
TAYLOR

In *Rol. Abr. "Action sur case,"* 24. 15. the same doctrine is laid down as to the joint liability of persons partaking of a tavern dinner, — with this distinction, that those who are *invited* are not liable to the landlord, if he knew that fact. It is said, if A. invite B. "*a manger et boire en le maison de J. S., quant al hofte, ambideux font liable a paier le reckning, nifi le hofte conust B. d'estre invite.*"

But the officers of a regimental mess are only separately liable, each for his own share.

Brown v. Doyle and others.
Sittings after M.T. 1788. Cor.
Lord Kenyon.

This was an action for provisions furnished for the use of a mess of officers in camp, the defendants and others composing the mess. — Plea, *non assumpsit.*

A paper containing the account was proved, which was delivered by another of the mess to plaintiff with the word "paid" upon it, intimating that his proportion was paid.

Lord KENYON thought this shewed that the plaintiff meant to charge them severally. He also thought that originally they were only severally liable; and the verdict was for the defendants.

GANTT v. MACKENZIE.

Tuesday,
July 23.

THIS was an action on a bill of exchange for 1000*l.* drawn at *Barbadoes* the 8th of February 1809, by

dishonored here for non-acceptance, where the plaintiff is allowed a *per centage* in name of damages, he is only entitled to interest from the day when the bill ought to have been paid.

1811.
 GANTT
 v.
 MACKEN-
 ZIE.

the defendant on *Scott, Idles & Co.* in London, payable to the plaintiff at 60 days sight.

The bill was refused acceptance on the 17th April 1809, and was afterwards presented for payment on the 19th June following, and again dishonoured.

The only question was, from what period interest was to be calculated.

LORD ELLENBOROUGH left this upon the custom of merchants, to the gentlemen of the special jury; who said, the holder of the bill was entitled to 10*l.* per cent. as damages, and that interest was to be allowed only from the time when the bill was presented for payment; and Mr. *Waddington*, the foreman, observed that he had known it so settled in a case before Mr. JUSTICE BULLER.

Verdict accordingly.

Garrow and *Caslee* for the plaintiff.

The *Attorney General* and *Park* for the defendant.

[Attornies, *Gregson & Co.* and *Humphreys*.]

Where there is no allowance for damages, the plaintiff is entitled to interest from the day the bill was dishonoured for non-acceptance.

But in a case of *Harrison v. Dickson* tried the same sittings, which was an action against the indorser of a bill of exchange drawn upon England from *N. S. Wales*, the plaintiff did not

claim any per centage upon the principal as damages, and was allowed interest from the time the bill was dishonoured for non-acceptance.

BELLAIRS

BELLAIRS AND ANOTHER v. EBSWORTH.

1811.

Wednesday,
July 24.

THIS was an action of debt on bond dated 7th August 1806, executed by the defendant, one Philip Nott, and one John Nott, by which they bound themselves jointly and severally in the penal sum of 1500*l.* under the following condition :

If A. become bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, and C. afterwards, with B.'s knowledge, takes D. as his partner ; the guarantee does not extend to sums of money received by C. for B.'s use, after the formation of the partnership.

“ Whereas the above bounden Philip Nott hath for some time past acted as the agent for the said A. and J. Bellairs, in the receiving of various large sums of money for them, and the said Philip Nott will continue to receive money and other things on their account. And whereas the better to secure the said A. and J. Bellairs the payment of all such sum and sums of money, which at any time hereafter shall be in the hands of the said Philip Nott belonging to the said A. and J. Bellairs, the said Philip Nott hath proposed and agreed to execute this present bond of indemnity, and hath prevailed on the said John Nott and John Ebsworth to become surety for and to join with him the said Philip Nott in the execution hereof, and to guarantee the said A. and J. Bellairs and the survivor of them against any loss they may happen to sustain on account of their confidence in the said Philip Nott touching the matters aforesaid : Now the condition of the above written obligation is such, that if the above bounden Philip Nott, his heirs, executors and administrators do and shall from time to time, and at all times,

CASES AT NISI PRIUS,

1811.

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and Another
v.
ESBORTH.

as often as he or they shall be thereunto required by the said A. and J. Bellairs, or the survivor of them, make, draw out and deliver unto them, or the survivor of them, a true and just account of all such sum and sums of money, bonds, bills of exchange, promissory notes, or other securities for money, which he the said Philip Nott, shall or may hereafter receive or be intrusted with for and on account of the said A. and J. Bellairs or the survivor of them; and if the said Philip Nott, his heirs, executors or administrators shall and do, from time to time, and at all times hereafter, when thereunto required, pay or cause to be paid unto the said A. and J. Bellairs or the survivor of them, all such sum and sums of money which the said Philip Nott shall hereafter receive or be intrusted with for, or on account of the said A. and J. Bellairs or the survivor of them, and also shall when thereunto requested, deliver unto the said A. and J. Bellairs or the survivor of them, all such bonds, bills of exchange, promissory notes, or other securities for money, which he the said Philip Nott, shall or may hereafter receive or be intrusted with for or on their account; and if the said Philip Nott shall conduct himself truly, justly and honestly towards the said A. & J. Bellairs, and the survivor of them, in all his dealings and transactions with them or the survivor of them touching the matters aforesaid, then the above written obligation to be void, &c.

The defendant, after craving oyer, pleaded that Philip Nott had accounted &c. according to the condition of the bond.

The

The replication assigned several breaches, in not paying over money received by Philip Nott for the plaintiffs' use.

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BELLAIRS
and Another
v.
EASWORTH.

It appeared that the Messrs. Bellairs being bankers in the country, had employed Mr. P. Nott as their agent in London, to receive and pay money and securities on their account. He had no partner before or at the time the bond was executed; but he subsequently entered into partnership with two persons of the name of *Mingay*, and carried on business with them under the firm of *Mingay, Nott & Co.* The plaintiffs continued to deal with the new partnership as they had before done with P. Nott alone, till June 1810, when the house failed. A considerable sum of money was then due from them to the plaintiffs; but every thing had been regularly paid, which had been received by P. Nott only before the formation of the partnership.

Garrow for the plaintiff, contended, that the deficiency at the time of P. Nott's failure was a clear breach of the condition of the bond. The money due had been received by him, although he had received it conjointly with two others. Could it be said then that he had "paid or caused to be paid to the plaintiffs all such sum and sums of money which he had received or been entrusted with, for or on account of the plaintiffs, or that he had conducted himself truly, justly and honourably towards the plaintiffs in all his dealings and transactions with them?" The defendant, as surety, took upon himself the risk of P. Nott en-

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 {
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 and Another
 v.
 EBSWORTH.

tering into partnership with improper persons, and became liable for his good conduct as the plaintiffs' agent, whether acting separately or in conjunction with others.

Lord ELLENBOROUGH.—The defendant was surety for *Philip Nott*, and not for *Mingay, Nott & Co.* When the plaintiffs entrusted their agency to the new firm, the defendant's responsibility was at an end. He by no means undertook for the good conduct of any future partner with whom *P. Nott* might associate. The recital and the whole scope of the condition shew that the suretyship was confined to *P. Nott* individually.

Plaintiffs nonsuited.

Garrow and Gurney for the plaintiffs.

Park and Marryat for the defendant.

[Attornies, *Adam and Davies.*]

So if there be a bond conditioned for payment to A., B., and C., of all sums advanced by them their banking house to D., on the death of one of the partners, the obligation ceases. *Strange v. Lee*, 3 East, 484.

HOARE AND OTHERS v. GRAHAM AND ANOTHER.

1811.
Wednesday,
July 24.

THIS was an action on a promissory note for 4500*l.* dated 19th October 1810, made by *Gibbon & Boyce*, payable to the defendants two months after date, indorsed by them to *Grill & Son*, who indorsed it to the plaintiffs.

In an action on a promissory note or bill of exchange, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed, and payment should not be demanded when it became due.

The defence set up was, that the note had been drawn as a collateral security for certain advances made by the plaintiffs to *Grill & Son*; that at the framing of the note, the defendants refused to indorse it, unless the plaintiffs would agree that it should be renewed when it became due; that the latter acceded to this condition, and that they afterwards demanded payment, instead of calling for a renewal.

LORD ELLENBOROUGH. — I don't think I can admit evidence of this sort. What is to become of bills of exchange and promissory notes, if they may be cut down by a secret agreement that they shall not be put in suit? The parol condition is quite inconsistent with the written instrument. This purports to be a promissory note payable two months after date. You say it was not payable at the end of that time, and that when the two months had expired the payees, instead of the money, were to have another promissory note. I will receive evidence that the note was indorsed to the plaintiffs as a trust; but the condition for a renewal

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and Others
v.
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and Another.

newal entirely contradicts the instrument which the defendants have signed. Such an agreement rests in confidence and honour only, and is not an obligation of law. There may, after a bill is drawn, be a binding promise for a valuable consideration to renew it when due; but if the promise is cotemporaneous with the drawing of the bill, the law will not enforce it. This would be incorporating with a written contract an incongruous parol condition, — which is contrary to first principles. There must be a

Verdict for the plaintiffs.

The *Attorney General*, *Garrow* and *Marryat* for the plaintiffs.

Park and *Scarlett* for the defendants.

[*Attornies, Darves and Palmer.*]

So in an action on a policy of place different from that infert-
insurance, evidence cannot be ed in the policy. *Kaines v.*
received of a parol agreement *Knightly, Skin. 454.*
that the risk should begin at a

1811.

Friday, July 26.

POYNTON v. FORSTER AND OTHERS.

Seemle, that
in an action for
maliciously suing
out a commission

CASE for maliciously suing out a commission of bankrupt.

of bankrupt, it is a fatal variance to alledge, that the defendant sued the commission out of the
" *High Court of Chancery.*"

The

The declaration stated that the defendants, without any reasonable or probable cause whatsoever, sued and prosecuted, and caused and procured to be sued and prosecuted *out of His Majesty's High Court of Chancery* against the plaintiff a certain commission under the great seal of Great Britain, founded on the several statutes made and then in force concerning bankrupts, &c.

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POYNTON
v.
FORSTER
and others.

The Commission being put in,—

¹*Park* for the defendant, objected that it was misdescribed in the declaration, as it did not issue out of the *High Court of Chancery*. The jurisdiction of the person who holds the great seal in *bankruptcy* is quite distinct from his jurisdiction as *Lord High Chancellor*. The Master of the Rolls may represent him in the latter capacity, but cannot sit upon the most trifling bankrupt petition. A commission of bankrupt does not issue, like original writs, from the great *officina brevium* in the Court of Chancery; but it passes under the great seal by virtue of certain acts of parliament, and has no more its origin in the Court of Chancery than a patent for a new invention.

The *Attorney General* and *Holroyd*, contrâ, pointed out that the commission was issued upon a petition addressed to “John Lord Eldon, *Lord High Chancellor of Great Britain*,” and was actually signed by him “ELDON, C.” They contended that commissions issued by the Lord Chancellor might without impropriety be said to issue out of the Court of Chancery; and at any rate, that this description of the commission might be rejected as surplusage, and it was enough to
prove

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POYNTON
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FORSTER
and Others.

prove that it issued under the great seal of Great Britain, which would have been enough to state in the declaration.

Lord ELLENBOROUGH was inclined to think that the declaration contained a fatal misdescription of the commission, but saved the point at the request of the plaintiff's counsel (*a*).

In such action, to sustain an allegation, that the commission was duly superfeded, it is not enough to prove an order by the Lord Chancellor directing it to be superfeded.

The declaration further alleged, that the said commission was afterwards, on the application and petition of the plaintiff preferred to the Right Honourable John Lord Eldon, Lord High Chancellor of Great Britain, duly superfeded.

To support this allegation, an order was put in, signed by the Lord Chancellor, directing the commission to be superfeded.—But

Lord ELLENBOROUGH was of opinion that this was insufficient, and that it was necessary to produce a writ of superfedeads under the great seal (*b*).

Plaintiff nonsuited.

The *Attorney General, Garrow and Holroyd* for the plaintiff.

Park and Richardson for the defendant.

[Attornies, *Blacklock and Watkins*.]

-
- (*a*) *Vide Chapman v. Pickersgill*, 2 Wils. 145. licious arrest, to shew the former suit determined, it is not enough
- (*b*) So in an action for a ma- to put in a Judge's order to stay pro-

proceedings on payment of costs, no otherwise than by an entry of a *nolle prosequi*, the Court held that this evidence did not support the declaration; for the *nolle prosequi* is a discharge as to the indictment, but it is not an acquittal of the crime. *Godard v. Smith*, Salk. 21. 6 Mod. 261. S. C.

1811.
 POYNTON
 v.
 FORSTER
 and Others.

BLACKBURN AND ANOTHER v. THOMPSON.

Friday, July 26.

THIS was an action on a policy of insurance dated 21st December 1807, on the cargo of the *Elizabeth* and *Mary*, "at and from London, until the ship's arrival at her last port or place of trade and discharge in Hayti (formerly called St. Domingo)."

Since the 19th of May 1806, the trading between this country and ports and places in the Island of St. Domingo, not under the dominion and in the actual possession of his Majesty's enemies, has been lawful without any licence.

The vessel, under British colours, sailed from London in November 1807, with a cargo of dry goods, provisions and wine, the property of the plaintiffs, bound for St. Domingo. In the month of January following she arrived at *Cape François*, then under the dominion of *Christophe*. Here the plaintiff's agent sold and delivered about a fifth part of the cargo, and contracted with the Intendant of *Christophe* for the sale of the remainder, deliverable at *St. Marc's*, another port under the dominion of the same chief. The ship was proceeding thither when she was captured by his Majesty's ship *Dagadus* and carried into *Jamaica*. The cargo was proceeded against in the Vice-admiralty Court there, and condemned as lawful prize; but on appeal

1811. appeal to the Privy Council, this sentence was reversed,
 BLACKBURN and Another stored, on payment of the captor's expences.

v.
 THOMPSON.

No licence was put in on the part of the plaintiff.

Topping and *Carr* for the defendant, contended, that without a licence the voyage was illegal as a trading with the enemy. The Court must take notice that *St. Domingo* was a colony belonging to France, with whom we are at war; and whatever internal changes might take place in it, until recognized in a new capacity by some solemn act of our government, it must continue to be considered an enemy's colony. Courts of justice are incompetent to enquire whether such a change has taken place in a colony belonging to a foreign nation that it may be looked upon as separated from the mother country, and as having acquired an independent existence; and were the separation ever so complete, it is only from the King's proclamations and acts of state we can know whether the emancipated colony is to be considered hostile, neutral or friendly. In the words of Sir William Grant in the case of the *Pelican*, *Burke*, before the Privy Council (a), "it always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point on which courts of justice cannot decide."—It is therefore incumbent on the plaintiffs to shew, that before the commencement of the

(a) 1 Edwards, App. D.

voyage in question our government had legalized the trade between Great Britain and St. Domingo. But the first order in council for this purpose bears date 14th July 1808; and previous to that time all vessels sailing from Great Britain to St. Domingo traded under a licence, in the same manner as if they had been bound for a port of France on the continent of Europe. This very question has already been disposed of by the decision of the Court of Appeals in the cases of the *Dart* and *Happy Couple*, in which it was held that notwithstanding the unsettled state of St. Domingo, and that the authority of France was no longer regarded there, it was still in point of law under the dominion of France, and must be considered as an enemy's colony.

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 and Another
 v.
 THOMPSON.

17th March,
 1808, cited
 1 Edwards, 1.

The *Attorney General* for the plaintiff, allowed the general principle that a country which had been an enemy's colony, whatever internal revolution might happen in it, must still be considered in a court of justice as bearing an hostile character till recognized by our own government as standing in a different relation. Upon this principle the cases of the *Dart* and *Happy Couple* proceeded. These ships were taken early in the year 1805; and although it was matter of notoriety that a considerable part of St. Domingo had been then emancipated from the dominion of France, nothing had been done by our government to authorize a Prize Court to presume a change in its national character. But between that period and the commencement of the present voyage, orders in council were issued, which although they do not expressly
 legalize

1811. legalize the trade between Great Britain and St. Domingo, do most distinctly recognize that parts of that Island were no longer under the dominion of France, and were therefore to be considered neutral territory.

BLACKBURN and Another v. THOMPSON. By the first, dated 19th November 1806, His Majesty authorized the Governor of the *Bahama Islands*, and others, to grant licences to British vessels to clear out from the port of *Road Harbour* in the Island of *Tortola*, and from the free ports in the *Bahama Islands*, "to such ports or places in the Island of St. Domingo as are not or shall not be under the dominion and in the actual possession of any of His Majesty's enemies." On the recapture of *Buenos Ayres*, another order in council was issued, dated 11th February 1807, permitting all British vessels which had cleared out from any ports of the United Kingdom to *Buenos Ayres* and the *River Plata* "to proceed without interruption to any port of the Island of St. Domingo *not in the immediate possession and under the controul of France and Spain*, there to dispose of their cargoes." And by a similar order dated 15th July 1807, the Governor of *Nova Scotia* is authorized to grant licences to British ships to clear out from any port in the province of *Nova Scotia* "to such ports and places in the Island of St. Domingo as are not or shall not be under the dominion and in the actual possession of the government of France or Spain." These were authoritative declarations to courts of justice that parts of St. Domingo had ceased to be under the dominion of the enemy and to bear a hostile character, and opened the question in each particular case in which the legality of a

voyage to St. Domingo was disputed, whether the part of the Island to which the ship was bound was or was not under the dominion of the enemy. Such is the effect which has been given to these orders by our Courts of Prize. In the case of the *Manilla, Barret, Edwards, &c.* Sir William Scott held that in consequence of these orders in council, ports and places of St. Domingo not in possession of the French, were excepted out of the general character of the Island as an enemy's colony, so that the voyage of an American ship from *Port au Prince* to *Gottenburgh* was considered as not being contrary to the order in council of 11th November 1807, forbidding all commerce between the *enemy's colonies* and foreign states. So in the case of the *Pelican, Burke*, before alluded to, where the same question arose at the Cockpit, the vessel under Danish colours having been captured on a voyage from *Port au Prince* to *New York*, Sir William Grant in giving judgment says, "We are of opinion that these orders do contain a recognition on the part of His Majesty's government, that there are ports and places in St. Domingo not only not in the possession but also not under the dominion of *France*. The only ground for condemnation in this case is, the trading from a hostile colony; but that cannot apply to those parts of it which are not considered or held to be under the dominion of the enemy; and therefore the real question is as to the description and character of the port or place from which the vessel was trading. It was not necessary that government should have ascertained in what way affirmatively St. Domingo should be politically and commercially considered. It is sufficient for the present question, that the orders

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negative a hostile character applying to certain parts of the colony." The property was therefore restored. — In this case the only objection to the legality of the voyage is, that it is a trading to an enemy's port. But these orders declare that there are ports in St. Domingo which are not enemy's ports; and it is not contended that during any part of this adventure either *Cape Francois* or *St. Marc's* was in the possession or under the dominion of France. The voyage was therefore innocent in its own nature, and required no licence to legalize it. Had it not been so, the sentence of the Vice Admiralty Court would not have been reversed by the Privy Council.

Topping in reply, insisted that the very orders relied upon were strong to shew that voyages of British ships to St. Domingo (except from *Road Harbour* and the other ports specified, under a licence granted by the Governor,) were illegal, till the general order of 14th December 1808; and he denied that the cases of the *Manilla* or *Pelican* applied, as they turned merely upon the construction of the orders in council with respect to neutral navigation.

LORD ELLENBOROUGH. — The question here is, Whether the ship in question was engaged in a trading to a hostile territory. In the present situation of the world, the national character of different places must from time to time be determined by courts of justice. We had lately occasion to try the national character of *Corfu* (a.) The most potent evidence upon

(a) See *Donaldson v. Thompson*. 1 Campb. 429.

such a subject is the declaration of the state; and if the state recognizes any place as not being in the relation of hostility to this country, that is obligatory on courts of justice. In the order in council of 15th July 1807, though emitted for a different purpose, I find a distinct recognition that there are ports and places in the island of St. Domingo not in the possession or under the dominion of the enemy. Does not this bring it then to a point of fact, whether *Cape Francois* and *St. Marc's* were of that description, — about which there is no controversy. The court of appeal had all the circumstances before them; they knew how the voyage had been instituted and how it had been prosecuted; and as they ordered the property to be restored, I must consider that they recognized the voyage to be legal, and that there was a legal subject of insurance.

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Verdict for the plaintiff.

A rule obtained in the ensuing term to shew cause why this verdict should not be set aside, and a new trial granted, was afterwards discharged, — the whole court fully concurring with the opinion delivered by Lord ELLENBOROUGH at nisi prius.

The *Attorney General*, *Garrow*, *Park*, and *Campbell* for the plaintiff.

Topping and *Carr* for the defendant.

[Attornies, *Nind* and *Gibbs*.]

Vide Johnson v. Greaves, 2 Taunt. 344. acc.

OXFORD CIRCUIT.

SUMMER ASSIZES, 51 GEORGE III.

WORCESTER.

CROWN SIDE. CORAM LAWRENCE, J.

1811.

Tuesday,
July 30.

REX v. RICKETTS.

It is not an offence within the clause of Lord Ellenborough's act, 43 G. 3. c. 58., against maliciously cutting, with intent to resist lawful apprehension, if the cutting took place in an attempt to apprehend the prisoner previous to any notification being made to him of the purpose for which he was lawfully held of.

THIS was an indictment on Lord Ellenborough's act, 43 Geo. 3. c. 58. for maliciously cutting one *J. Webb* with intent to obstruct, resist and prevent the lawful apprehension and detainer of the prisoner.

It appeared that in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an outhouse belonging to one *J. Spilbury*. The wheat being soon after found concealed in an adjoining field, *Spilbury*, *Webb* and others, watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field, and lifted up the bag containing the wheat. They were immediately pursued, and *Webb* seized the prisoner, with-

without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before *Webb* had spoken, the prisoner drew a knife and cut him across the throat.

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 Rex
 v.
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Lawrence, J.—As *Webb* did not communicate to the prisoner the purpose for which he seized him, this case does not come within the statute. If death had ensued, it would only have been manslaughter. Had a proper notification been made before the cutting, the case would have assumed a different complexion. The prisoner must be acquitted upon this indictment.

He was afterwards found guilty of larceny in stealing the wheat.

Gleed and *Peake* for the prosecution.

Pettit for the prisoner.

But if a constable acting within his district, where he is generally known, produces his staff of office, the law will presume that the party to be apprehended had due notice of his intent, without a verbal notification. *Gordon's case*, 1 East, P.C. 315. And it is sufficient for a constable to say, he arrests *in the King's name*. 1 Hale. 583. Where the party knows the officer and his

business, the law requires no express notice to be given. As where *Pew* drew his sword upon a bailiff who came to arrest him, and said, "Stand off, I know you well enough, come at your peril;" and upon the bailiff's immediately taking hold of him without using words of arrest or shewing any warrant, *Pew* killed him: this was holden to be murder. *Pew's Case*, Cro. Car. 183.

GLOUCESTER.

CORAM LE BLANC, J.

1811.

Saturday,
Aug. 3.

BETTERBEE v. DAVIS.

It is not a good tender of a fractional sum, for the debtor to offer the creditor a bank note to a larger amount, and to desire him to take out of that the sum to be paid.

IN assumpsit, issue was joined upon a tender of the sum of 3*l.* 10*s.*

It appeared that before the action was commenced the defendant produced to the plaintiff a 5*l.* bank note, and desired him to take 3*l.* 10*s.* out of that. The plaintiff said "I will see you another time," and walked away.

The counsel for the defendant contended, that this was a sufficient tender; and relied upon *Wade's Case*, 5 Co. 115. *a*, where it was resolved, "That if a man tenders more than he ought to pay, it is good, for *omne majus continet in se minus*, and the other ought to accept so much of it as is due to him. *Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est. Et in majore summa continetur minor.*"

LE BLANC, J. The case in *Lord Coke* refers to monies numbered. If I tender a man twenty guineas in the current coin of the realm, this may be a very good tender of fifteen, for he has only to select so much

much, and restore me the residue. But a tender in bank notes is quite different. In that case, the tender may be made in such a way that it is physically impossible for the creditor to take what is due, and return the difference. If 3*l.* 10*s.* could be tendered by a note for 5*l.*, so it might by a note for 50,000*l.* The issue must be found for the plaintiff.

1811:
BETTERREE
v.
DAVIS.

Dauncey and Abbott for the plaintiff.

Jervis and Hughes for the defendant.

Vide *Spybey v. Hide*, 1 Campb. 181.

MONMOUTH.

CORAM LE BLANC, J.

DOE d. MORGAN v. CHURCH.

Monday.
Aug. 5.

EJECTMENT for a messuage and lands.

The defendant had held these premises together with certain *great and small tithes* at a joint rent of

Where a house, lands and tithes are held under a parol demise at a joint rent, a notice to quit, "the house, lands and premises"

the appurtenances," includes the tithes, and is sufficient to put an end to the tenancy.

Scutle: that although tithes are let by parol, the tenant is entitled to a notice to quit.

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MORGAN

v.

CHURCH.

145*l.* a year under a parol demise from the lessor of the plaintiff.

The question was, whether the tenancy was determined by the following notice to quit :

Mr. Edward Church,

I do hereby give you notice to quit and deliver up to me or my assigns on the 2nd of February next, the quiet and peaceable possession of all *that messuage, tenement or dwelling house, farm, lands, and premises* with the appurtenances which you rent of me in the parish of S. or elsewhere in the county of M. Dated 30 April 1810.

A. Morgan.

Dauncey and *Peake* for the defendant, contended, that the notice did not extend to the *great and small tithes*, and was therefore a nullity. Where several things are held under a joint demise, the lessor cannot determine the tenancy as to part only. But this notice contained no words which could possibly apply to tithes. The tenancy as to the tithes therefore still continued ; and in that case, so did the tenancy as to the house and lands now sought to be recovered.

Jervis and *Abbott* contra, gave two answers to the objection, 1st. That as tithes cannot be demised except by deed, and as the demise here was by parol, the defendant never had any legal interest in the tithes and there was no tenancy as to them to be determined. 2^{dly}, That the word *premises* was large enough to com-

comprehend the *tithes*, and was not to be confined to the house, farm, and lands before mentioned.

1811.
MORGAN
v.
CHURCH.

Le Blanc, J. said, If there be a joint demise of land and tithes at a joint rent, it is clear that the landlord cannot determine the tenancy as to the land without at the same time determining it as to the tithes. In this case, he was inclined to think that although the tenant had only a licence to take the tithes, the notice ought to extend to them. But he was clearly of opinion that the notice was sufficient for that purpose. Where the tithes were held along with the farm, it must have been understood by both parties that this notice was to apply to both. His Lordship therefore directed a

Verdict for the lessor of the plaintiff,

Although a lease of tithes cannot be without deed, yet a parol agreement for retaining tithes must be determined by a notice with analogy to the notice given in a holding of land. Wyburd v. Tuck, 1 Bos. and Pul. 465. Bishop v. Chichester, 4 Groom v. 1316, 2 Bro. C. C. 161 S. C.

CROWN SIDE, CORAM LAWRENCE, J.

Tuesday,
Aug. 6.

THIS was an indictment on the 2nd sect. of Lord Ellenborough's act, 43 Geo. 3. c. 58, for administering

with having administered to a woman the decoction of savin, with intent to procure abortion, it is no material variance that the preparation of savin administered, is properly called an infusion, not a decoction.

Upon an indictment on 43 G. 3. c. 58. § 2. charging the prisoner

administering

1811.

nistering *savin* to a woman *not* quick with child, for the purpose of procuring abortion. (a)

The first count of the indictment charged that the prisoner on the 10th day of January 1811, and on divers other days and times between that day and the 20th of March in the year aforesaid, at the parish of St. Mary's in the county of Monmouth, wilfully, maliciously, unlawfully and feloniously did administer to and cause to be administered to and taken by one *Hannah Mary Goldsmith*, single woman, divers large quantities, that is to say, 6 ounces of the *decoction* of a certain shrub called *Savin*, then and there being a noxious and destructive thing, the said *H. M. G.* on the said 10th day of January in the year aforesaid, and continually from thence until the said 20th day of

(a) The act provides that if any person or persons shall wilfully and maliciously administer to, or cause to be administered to or taken by any woman any medicines, drug or other substance or thing whatsoever, or shall use or employ or cause or procure to be used or employed, any instrument or other means whatsoever with intent thereby to cause or procure the miscarriage of any woman not being or not being proved to be quick with child at the time of administering such things, or using such means, that then and in every such

case, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be and are hereby declared to be guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publicly or privately whipped, or to suffer one or more of the said punishments, or to be transported beyond the seas for any term not exceeding fourteen years, at the discretion of the Court before which such offender shall be tried and convicted,

March

March in the year aforesaid, at &c. aforesaid, being with child, but not quick with child, to wit, at the respective times of administering such divers large quantities of the decoction of the said shrub called *Savin* as aforesaid, with intent thereby to cause and procure the miscarriage of the said *H. M. G.*, against the form of the statute, &c. 1811.

It appeared that the prisoner prepared the medicine which he administered to Miss *Goldsmith* by pouring boiling water on the leaves of a shrub: and the medical men examined, stated that such a preparation is called an *infusion* not a *decoction*,—which is made by boiling the substance in the water.

The prisoner's counsel insisted that he was entitled to an acquittal on the ground that the medicine was misdescribed.

Lawrence, J. That objection will not hold. The infusion and decoction are *ejusdem generis*, and the variance is immaterial. The question is, whether the prisoner administered any matter or thing to this woman with intent to procure abortion.

Witnesses were called for the prisoner to prove that the shrub he used was not *savin*.

Upon an indictment on 43 Geo. 3. c. 58. §. 2, charging that the prisoner ad-

ministered to a woman with child but not quick with child, for the purpose of procuring abortion, a large quantity of a certain "mixture to the jurors unknown, then and there being a noxious and destructive thing," it is unnecessary to prove that the mixture was noxious or destructive, or even that the woman was actually with child.

1871.

The counsel for the prosecution, insisted, that even in that case the prisoner might be found guilty upon the last count of the indictment, which charged that he administered a large quantity "of a certain mixture to the jurors unknown, then and there being a noxious and destructive thing."

The prisoner's counsel objected that unless the shrub was *savin*, there was no evidence that the mixture was "noxious and destructive."

Lawrence J. In an indictment on this clause of the statute, it was improper to introduce these words; and although they are introduced, there is no necessity to prove them. It is immaterial whether the shrub was *savin* or not, or whether or not it was capable of procuring abortion, or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute, and he is guilty of the offence laid to his charge.

The prisoner urged that he had given the young woman an innocent draught for the purpose of amusing her, as she had threatened to destroy herself, unless enabled to conceal her shame; and the Jury returned a verdict of *not guilty*.

The words "quick with child," in the first section of 43 G. 3. c. 58., are to be understood in their popular sense, viz. when the woman has felt the child move within her.

The prisoner had been previously tried on the first section of the statute (a) for the capital charge, in

(a) Whereby it is enacted that maliciously and unlawfully administer to, or cause to be administered

administering savin to Miss *Goldsmith* to procure abortion, she being then quick with child. In point of fact, she was in the fourth month of her pregnancy. She swore, however, that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men in their examinations, differed as to the time when the foetus may be stated to be quick, and to have a distinct existence; but they all agreed that in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception.

1811.

LAWRENCE J. said, this was the interpretation that must be put upon the words *quick with child* in the statute; and as the woman in this case had not felt the child alive within her before taking the medicine, — he directed an acquittal.

In the course of the trial the prisoner's counsel proved that there is not any such parish in the county of *Monmouth* as the parish of *St. Mary's* laid in the in-

Q. whether it be now necessary in an indictment for felony, to lay a parish within the county.

ministered to or taken by any of His Majesty's subjects, any deadly poison or other noxious and destructive substance or thing, with intent thereby to cause and procure the miscarriage of any woman then being quick with child, the offender shall suffer death as in cases of felony without benefit of clergy."

dictment.

dictment. — It was contended on the other side, that it is no longer necessary in such an indictment to lay any parish, as the jury are to come from the body of the county.

LAWRENCE, J. said he would save the point for the opinion of the Judges.

Hughes and Glead for the prosecution.

Clifford and Puller for the prisoner.

HEREFORD.

CROWN SIDE. CORAM LE BLANC, J.

Wednesday,
Aug. 7.

REX v. GEORGE WINDOW.

Stat. 26 Hen. 8.
c. 6. authorizing
the trial of felo-
nies committed
in Wales, in the
next adjoining
English county,
extends to felo-
nies subsequently
created.

THE prisoner was tried before GRAHAM, B. at the last Lent Assizes for the county of *Hereford*, upon an indictment which charged, that on the 27th day of August in the 50th year of His Majesty's reign, he had in his possession, at *Llangeny* in the county of *Breckon*, twelve reams of paper, with a counterfeit mark of the stamp of His Majesty's Excise Office on the covers or wrappers of the said reams of paper, knowing the same to be counterfeited.

By 49 Geo. 3. c. 80. this offence is made a felony, punishable with seven years transportation.

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 {
 REX
 v.
 WINDOW.

The prisoner's counsel contended that he could be legally tried upon this charge only in the county of *Brecon*, where it was alledged to be committed. They denied that 26 Hen. 8. c. 6. which provides that the felonies therein mentioned when committed in Wales may be tried in the next adjoining English county, extends to felonies created since the passing of that statute; and they relied mainly upon 26 G. 2. c. 19. which makes the plundering the effects of any vessel wrecked or in distress, felony without benefit of clergy, and which enacts by sect. 8. "that if the fact be committed in Wales, then the prosecution shall or may be carried on in the next adjoining English county."—Such a provision would have been wholly unnecessary had the statute of 26 Hen. 8. extended to the trial of all felonies, whether created before or after. Therefore, if the words of 26 Hen. 8. were equivocal, the more recent statute must be considered a legislative declaration, that it extended only to murders and such offences as were felonies when the act passed.

GRAHAM B. said he would save the point for the opinion of the Judges.—Accordingly, the prisoner being found guilty, judgment was respited till the present assizes.

The prisoner being now put to the bar,—

1811. LE BLANC, J. recapitulated the proceedings, and
 stated the objection taken by the prisoner's counsel.
 REX. He then said that this objection had been considered
 v. by the Judges, who were all of opinion that the statute
 WINDOW. of 26 Hen. 8. extended to felonies subsequently cre-
 ated, and that the prisoner had been rightly tried
 for this offence in the county of *Hereford*. His Lord-
 ship concluded by sentencing him to be transported for
 the term of 7 years.

Jervis, Dauncey and Abbott for the prosecution.

Bevan, Glead and Puller for the prisoner.

Vide Rex v. Parry, 1 Leach C. C. 125. 2 East P. C. 773.
 S. C.

SHREWSBURY.

CORAM LE BLANC, J.

Tuesday,
 Aug. 13.

CHANDLER v. THOMPSON.

If an antient
 window be raised
 and enlarged,
 the owner of the
 adjoining land
 cannot lawfully obstruct the passage of light and air to any part of the space occupied by the antient
 window, although a greater portion of light and air be admitted through the unobstructed part of the
 enlarged window than was antiently enjoyed.

THIS was an action on the case for stopping up a
 window in the plaintiff's dwelling house.

It

It appeared that there had been for many years a small window in the place in question. About three years ago, the plaintiff considerably enlarged it, both in height and width, and put in a sash frame instead of a leaded casement. The defendant, who is the owner of the adjoining ground, then erected the building complained of, which completely covered several inches of the space occupied by the old window, but still admitted more light to pass through the new window than the plaintiff had enjoyed before the alteration.

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CHANDLER
v.
THOMPSON.

Jervis for the defendant, insisted that under these circumstances the action could not be maintained. The plaintiff had only a right to so much light as he had appropriated by 20 years' enjoyment; and more than that was still left to him. Though the defendant might not object to a small window looking into his yard, a larger one might be very inconvenient to him, by disturbing his privacy, and enabling people to come through to trespass upon his property. But he could only reduce the window to its ancient size by building from below; and a part of the space occupied by the old window was thus necessarily obstructed.

LE BLANC, J., however, was of opinion that the whole of the space occupied by the old window was privileged, and that it was actionable to prevent the light and air from passing through this as it had formerly done. That part of the new window which constituted the enlargement might be lawfully obstructed, but the plaintiff was entitled to the free admission

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CHANDLER
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THOMPSON.

admission of light and air through the remainder of the window, without reference to what he might derive from other sources. — His lordship likewise observed, that although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained, and when he was in the Common Pleas he had heard it laid down by Lord C. J. EYRE that such an action did not lie, and that the only remedy was to build on the adjoining land, opposite to the offensive window.

The plaintiff had a verdict.

Dauncey and *Puller* for the plaintiff.

Jervis and *Campbell* for the defendant..

Vide *Martin v. Goble*, 1 Campb. 322.

ADJOURNED SITTINGS AT GUILDHALL.

Before Michaelmas Term,

52 GEORGE III.

1811.

GRONING v. CROCKETT.

Tuesday,
October 29.

POLICY of insurance on goods by the *Fortuna*, from London to the Baltic. The ship was in fact bound for *Riga*, and sailed from London in the summer of 1810. Meeting with stormy weather, she was obliged to put into *Memel*, where she was detained by contrary winds, and seized in the month of December. There was a British licence for the voyage, which was to be in force till the 29th of September.

Where a licence is granted for a voyage to a hostile country, to continue in force till a given day, if the voyage is *bonâ fide* begun before that day, it continues to be protected by the licence though delayed beyond the day by stress of weather or other accident over which the assured have no controul.

Park, for the defendant, objected, that after that day the assured were engaged in an illegal adventure, and the policy was void. — But

Lord ELLENBOROUGH held, that the voyage having commenced before the 29th of September, and the ship having afterwards been detained by stress of wea-

1811.
 GRONING
 v.
 CROCKETT.

ther, the licence operated as a remission of the King's rights of war till the adventure was completed, and preserved the legality of the policy of insurance.

Verdict for the plaintiff.

Garrow and *Marryat* for the plaintiff.

Park and *Jervis* for the defendant.

So where there is a policy "*at and from*," if the ship has her cargo on board and is ready to sail before the day when the licence expires, although she is detained in port till after the day by contrary winds, the policy remains valid. *Schroder v. Vaux. Same Sittings.* Policy "*at and from Archangel to London.*" Licence to remain in force till 29th September. The ship had her cargo on board, and was ready to sail before that day, but was prevented by contrary winds.

Lord ELLENBOROUGH overruled an objection taken on this ground at *nisi prius*, and the Court afterwards refused a rule to shew cause upon it, — saying that the adventure could not become illegal although not consummated before the day mentioned in the licence; that if

the policy had not attached before that day, the law might be otherwise; but here the policy at Archangel had attached before the 29th of September; and that it was exactly the same as if the licence had expired the day before the ship reached the port of London.

The same construction has been put upon these licences in the Court of Admiralty, and Sir William Scott has laid it down as a *general rule* "that where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the licence into literal execution by a power which they could not controul, they shall be entitled to the benefit of its protection, although the terms may not have been

been literally and strictly fulfilled." *Gode Hoop, Pieters, Edwards's Cases on Licences*, 6. Accordingly, in one instance where a ship had been detained under an embargo at *Charente* near two years after the licence had expired, he or-

dered the property to be restored. *Johan Pieter, Schwartz, ib.* 28. But in all cases where ships trading with the enemy have been brought in after the time mentioned in their licences had expired, the captors have been allowed their expences.

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v. 1
CROCKETT.

HORNEYER v. LUSHINGTON.

Friday, Nov. 1

THIS was an action on a policy of insurance on the Ship *Amelia* and her cargo, "at and from *Gottenburgh* to *Riga*." The interest was laid in the plaintiff, who is a Swedish subject residing at *Gottenburgh*, and a total loss was averred to have happened from the seizure and detention of the ship and cargo by the Russian government. The ship took in her cargo in the port of London, touched at *Gottenburgh*, and arrived at *Riga* the 22d of September 1809. Sweden and Russia being then at war, she carried simulated papers, representing that she came from *Bergen* in Norway, and had taken in her cargo there. These papers, upon her entering the harbour of *Gottenburgh*, were delivered by the Captain at the custom house, and were immediately sealed up and forwarded to *Petersburgh*. In the mean time, the ship's hatches were sealed down, and an officer of government remained constantly on board. At the end of 12 days

If a ship insured is condemned for carrying simulated papers contrary to the law of nations, without having any liberty in the policy to do so, the underwriters are discharged.

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HORNEYER

v.

LUSHING-
TON.

orders were received from the Emperor of *Russia* to put the ship and cargo under sequestration. They were accordingly seized on the part of his Imperial Majesty, and never restored.—This was the plaintiff's case.

The defendant's counsel put in the sentence of "The St. Petersburg Committee of Neutral Navigation," by which the ship and cargo were condemned. The sentence, after reciting that the Captain had exhibited a bill of health and other papers as if from *Bergen*; that these were discovered to be false and counterfeited; and that the ship and cargo being put under sequestration, proceedings had been instituted against them, "laid down for a basis; 1. That the *Bergen* bill of health was illegal and unjustifiable; 2. That this vitiated the rest of the ship's papers, and proved that she had not come from *Bergen*; 3. That the claim of the Russian government to the said ship and cargo was founded on the right of war, the said vessel having violated the laws of neutrality in bringing to a Russian port a cargo the property of an enemy concealed under false documents; 4. That the ukase of the 14th May 1809, was infringed by the muster-roll issued at *Bergen* being false and fabricated; 5. That the request for the vessel to be expelled the ports of *Russia* is inadmissible, she having arrived at *Riga* in violation of the laws of neutrality, which act subjected her to be treated in conformity to the maritime laws which prescribe the confiscation of all ships and cargoes furnished with false papers." The sentence then states

states that "the committee taking into consideration these circumstances as well as the principal points of the said maritime law, and the imperial decree of 14th May 1809, as relating thereto; regarding also the opinions of classical authors most favourable to neutrality, have unanimously resolved, that the ship *Amelia* commanded by Captain *Sagert*, arrived at *Riga* with a cargo of goods purporting by the bills of lading to have been shipped at *Bergen*, be condemned together with her rigging and appurtenances for the benefit of the crown, as also the whole of the cargo &c."

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Garrow for the defendant, contended, that as the policy contained no liberty to carry simulated papers, and as the ship and cargo had been condemned for the carrying of simulated papers contrary to the law of nations, the underwriters were discharged.

The *Attorney General*, contrà, insisted that the ship in this voyage had a right to carry simulated papers without any express leave being given for that purpose. They were used as the means of safety. Without them the ship and cargo must have been inevitably condemned. *Sweden* and *Russia* being at war, had a *Swedish* ship acknowledging herself to have come from *Gottenburgh* failed into the port of *Riga*, she would have gone to certain destruction. Then it might have been said, that the assured had themselves caused the loss, and therefore could not resort to the underwriters for an indemnity. From the nature of the

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risk, it must have been perfectly well understood between the parties that simulated papers were to be used; and for that reason no express liberty to use them appears upon the face of the policy. The underwriters never would have signed the policy unless in the expectation that such means would be employed to protect the ship and cargo. There is no imputation of fraud. It must be admitted that the sole object of the assured was the protection of the property, in which the underwriters had an equal interest, and that the course they pursued was the best adapted that could have been devised for that purpose. But it may be laid down as a principle, that the assured acting *bonâ fide*, have a right to do whatever is necessary for the preservation of the subject matter insured. Suppose an enemy heaves in sight, may not a ship hoist false colours? May she not display the flag of an enemy, or any neutral flag, as will best answer the purpose of deception, and favour her escape? Might she not do the same if she were driven by stress of weather into an enemy's port? What is the difference between using false *papers* and false *colours*? Is it not equally the duty of the captain to protect the ship and cargo in the port of destination as in a port where he seeks for shelter from the violence of the elements?

LORD ELLENBOROUGH. — I am of opinion that the underwriters are not liable in this case, as the assured must be considered the efficient cause of the loss, by an act which is in itself illegal, and for which no

liberty is given in the policy. In deference to decided cases, I am bound to believe that the ground alleged in the sentence of condemnation is that upon which the seizure and confiscation proceeded. By this sentence, the ship and cargo are condemned for a breach of the law of nations in carrying fabricated papers. The object for which they were carried is immaterial, the thing being unlawful, and done without the defendant's consent. The liberty to carry simulated papers is now frequently expressed in policies of insurance, and ought to have been so in this instance, if such means were to be resorted to for protecting the ship and cargo. From the state of hostility between *Sweden* and *Russia* it does not necessarily follow that the parties contemplated the use of simulated papers. The underwriters might as naturally have supposed that the voyage would be protected by a licence from the Russian government. The assured is justified only in doing *what is lawful* for the preservation of the ship and cargo. Here the sentence alleges that the captain, who is the agent of the assured, was guilty of a breach of the law of nations, and on that ground does the condemnation proceed. Who induced the loss? The assured. And that being so, it would be contrary to the first principles of insurance law if he were allowed to recover.

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 v.
 LUSHINGTON.

In the course of the trial it was likewise debated, whether the policy on the goods had attached, they being loaded at *London* not at *Gottenburgh*; if not, whether the plaintiff was entitled to a return of premium; and whether

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 TON.

whether the policy on the ship had not expired, as she had been moored 24 hours in good physical safety at *Riga* before the seizure.

A verdict was given for the defendant, with leave to move upon any of these points.

In the ensuing term the *Attorney General* brought them all before the Court. Lord ELLENBOROUGH and the other Judges were clearly of opinion, that the underwriters were discharged by the sentence of condemnation, and would only grant a rule to shew cause why a verdict should not be entered for the plaintiff for the amount of the premium to be returned for short interest, if the policy on the goods never attached. — In Hilary term following the rule in this shape was made absolute, the Judges all concurring in the authority of the case of *Spitta v. Woodman*, 2. Taunt. 416.

The *Attorney General*, *Park*, and *Holroyd* for the plaintiff.

Garrow, *Scarlett*, and *Campbell* for the defendant.

[Attornies, *Gatty* and *Blunt*.]

Vide Bell v. Carstairs, 14 East 374.

1811.

REX v. CHAPPLE.

Saturday,
Nov. 2.

THIS was an indictment against the defendant for refusing to take upon himself the office of constable for the precinct of *St. Faith under St. Paul's*, in the Ward of *Farringdon-within*, in the city of London.

A member of the Barbers Company in the City of London, is not exempted from serving the office of constable.

The defendant, a trunk-maker by trade, claimed an exemption from serving this office as being a member of the *Barbers Company*.

Marryat, as his counsel, now contended that upon the construction of 3 Hen. 8. c. 11.—5 Hen. 8. c. 6. and 32 Hen. 8. c. 42., the exemption from serving offices of this sort originally granted to the *Surgeons Company* not exceeding twelve, was extended to all the members of the *Barbers Company* when the two were united. — But

Lord ELLENBOROUGH was of opinion that the exemption was confined to such as had been examined by the Bishop of London, or Dean of St. Pauls, and licenced to practice surgery according to the provisions of the statutes cited.

The defendant was found guilty.

The

The *Attorney General*, *Garrow*, and *Bolland* for the prosecution.

Marryat for the defendant.

[*Attornies, Newman and Huffy.*]

1811:

Thursday,
November 5.

BARROW v. COLES.

By a bill of lading, goods are deliverable to J. S. if he should accept and pay a bill of exchange;—if not, to the holder of the said bill of exchange.—J. S. accepts the bill of exchange, and indorses the bill of lading for a valuable consideration; but does not pay the bill of exchange when due.—Held, that upon its dishonour, the property of the goods vested in the holder of it, and that he might maintain trover for the goods against the indorsee of the bill of lading.

TROVER for 100 bags of coffee.

On the 20th March 1810, *Norton & Fitzgerald* at Demarara, drew a bill of exchange upon *Voss* in London, payable to their own order, and indorsed it to the plaintiff, at the same time annexing to it a bill of lading of the coffees in question, with an indorsement upon it, making them deliverable to *Voss* if he should accept and pay the draft, if not, to the holder of the said draft.

The bill of exchange and bill of lading being sent to *Voss*, he accepted the former, and detached the latter from it. He then indorsed the bill of lading for a valuable consideration to the defendant; but he did not pay the bill of exchange.

Lord ELLENBOROUGH held, that the special indorsement on the bill of lading ought to have made the defendant inquire whether the condition on which
the

the coffees were deliverable to *Voss* had been fulfilled, and that after the dishonour of the bill of exchange, the property in the coffees vested in the plaintiff, — who had a verdict accordingly.

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BARROW
COLES.
v.

Park and *Lawes* for the plaintiff.

Garrow and *Gurney* for the defendant.

[Attornies, *Street* and *Walton*.]

*Vide Cox*e v. *Harden*, 4 *East*, 211.

HOBBS v. HANNAM.

Tuesday,
Nov. 5.

THIS was an action on a policy of insurance on the ship *Jane*, valued at 3600*l*. “at and from Rio Janeiro to any port or place in the River Plate, and from thence to her port of discharge in Great Britain or Ireland.”

Where it is stipulated by a charter party, that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage.

The ship was the property of the plaintiff, and was chartered by him to one *Woodman*, who covenanted by the charterparty that in case the ship was lost he should pay the plaintiff 3600*l*. *Woodman* addressed the ship to one *Kendal* at *Rio Janeiro*, whose orders he desired the captain *implicitly to obey*.

When the ship reached *Rio Janeiro* she was ordered by *Kendal's* partner to proceed to *Buenos Ayres*, where *Kendal* himself then was. Upon her arrival at the latter

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latter place, *Kendal* sent smuggled goods on board; for which she was seized and condemned by the Spanish government.

Garrow for the defendant, first objected that the plaintiff had not an insurable interest in the ship, as he had a right to recover the 3600*l.* from *Woodman* the charterer. —

LORD ELLENBOROUGH held, that he was not bound to trust exclusively to the credit of the charterer; but might likewise protect himself by a policy of insurance.

If a chartered ship be lost by means of the captain engaging in an illegal trade in obedience to the orders of the charterer, this is not a loss by barratry for which the owner of the ship can recover against the underwriters.

Garrow then contended, that this was a loss which had arisen directly from the act of the assured; and for which the underwriters therefore could not be liable.

Marryat, contra, insisted that this was a loss by barratry. The charterparty gave no leave to go to *Buenos Ayres*, and the master ought not to have gone there, the voyage being illegal. He might mean to do the best he could for his employer; but within the late case of *Earl v. Rowcroft (a)*, his act being illegal, was nevertheless barratrous. It could not be said he had acted in obedience to the owner of the ship. The plaintiff was the owner of the ship, and *Kendal* was not his agent, but the agent of *Woodman* the charterer.

LORD ELLENBOROUGH. — I clearly think the loss is to be imputed to the plaintiff himself. If I give the

(a) 8 East, 126.

dominion of my ship to a charterer, his acts are my acts; and in this case *Kendal*, whose orders the master implicitly obeyed according to his instructions, was in point of law the agent of the plaintiff. Therefore the loss arose from following his own orders, and there is no pretence for imputing it to *barratry* (a).

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v.
HANNAM.

The plaintiff was nonsuited.

To obviate the difficulty of the voyage to the river Plate being illegal, it was mentioned during the trial, that although the ship sailed without any licence, a retrospective licence from the South Sea Company was obtained afterwards.

Seemle that after a ship has sailed on a voyage to a place within the limits of the S. S. Company, a retrospective licence granted by the Company, is insufficient to legalize the voyage.

Lord ELLENBOROUGH said he was inclined to think this was insufficient to purge the illegality, the forfeiture not being exclusively to the Company, but partly to the crown, and partly to the common informer (b).

Marryat and *Nolan* for the plaintiff.

Garrow, *Jervis*, *Gurney*, and *Abbott* for the defendant.

[Attornies, *Pasmore* and *Reardon*.]

(a) But where a ship is let to freight, a deviation for an illegal purpose, without the knowledge of the freighter, is *barratry* as to him, although it be with the consent of the original owner. *Vallejo v. Wheeler*, Cowp. 143.
(b) *Vide* 9 Ann. c. 21. § 49. — *Toulmin v. Anderfon*, 1 Taunt. 227.

1811.

Tuesday,
Nov. 5.

REX v. PUNSHON.

Seemle that on an indictment against a bankrupt for perjury before the commissioners in passing his last examination, it is necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy.

THIS was an indictment for perjury, charged to have been committed by the defendant in passing his last examination before the commissioners named in a commission of bankrupt before then issued against him.

The indictment alleged that the defendant was in due manner found and declared a bankrupt, and that the commissioners had sufficient power and authority to administer an oath to him upon the occasion in question.

To support these allegations, the counsel for the prosecution put in the commission of bankrupt and the proceedings under it, and proved the handwriting of the commissioners to the adjudication of the defendant having become bankrupt.

It was contended on the other side, that they were bound to give strict evidence of the trading, petitioning creditors debt and act of bankruptcy.

The counsel for the prosecution answered that while the commission subsisted and was not superseded by the Lord Chancellor, it must be taken to be legal and valid, and credit must be given to the proceedings of the commissioners under it, as founded upon sufficient grounds.

grounds. They had found and declared the defendant a bankrupt, and the Court must presume that they did so duly, at least till the contrary appeared. The indictment alleged, not that the defendant was a bankrupt, but that he was duly found and declared a bankrupt, which the proceedings abundantly testified.

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 REX
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LORD ELLENBOROUGH.—I am strongly inclined to think that you ought to give strict evidence of the bankruptcy. Unless the defendant really was a bankrupt, the examination was unauthorized. It goes to the authority of the commissioners to administer the oath. Their authority takes its root, not in the commission, but in the bankruptcy. While the commission subsists, its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt, all falls to the ground. However, I will save the point.

The defendant was acquitted on the merits.

The *Attorney General* and *Gurney* for the prosecution.

Garrow and *Marryat* for the defendant.

[Attornies, *Bell* and *Harmer*.]

Vide *Rex v. Bullock*, 1 Taunt. 71.

1811.

Tuesday,
Nov 5.

REX v. WHITE.

On the trial of a misdemeanor, the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury: but if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the Court will hear this argued by his counsel.

THIS was an information by the Attorney General for a libel in a newspaper called *The Independent Whig*.

When the first witness for the crown had been examined in chief, —

A Gentleman at the bar said, he had received a brief on behalf of the defendant instructing him to examine and cross-examine the witnesses, and to argue any point of law that might arise in the course of the trial; but stating that the defendant reserved to himself the right of addressing the jury. The same course had been pursued in the case of *Redbed Yorke*, who was tried at the York Assizes before Mr. Justice ROOKE. By the permission of that Judge, the defendant there had counsel, who examined some of the witnesses; he examined others himself, and he delivered an address to the jury.

LORD ELLENBOROUGH.—I do not exactly remember what indulgence was granted to the defendant in that case; and I do not feel myself bound by it as a precedent. I am afraid of the confusion and perplexity which would necessarily arise, if a cause were to be conducted at the same time both by counsel and by the party himself. I am extremely anxious that a
 person

person accused should have every assistance in making his defence; but I must likewise look to the decent and orderly administration of justice. I therefore cannot allow counsel to examine witnesses for the defendant, if he is likewise to put questions to them himself and afterwards to address the jury. If in the course of the trial, any point of law arises which he declares himself incompetent to argue, I will be very ready to hear it discussed by his counsel, although he conducts the defence himself. I will do in this respect as was done formerly in capital cases, when the assistance of counsel was not permitted to the prisoner upon matters of fact. I think I cannot consistently with my duty go farther; and surely there is no hardship in the rule I lay down. If the defendant has counsel to conduct his cause, he may suggest any question to them which he considers fit to be put; or if he takes the conduct of it upon himself, he may have the benefit of their private suggestions upon matters of fact; and as soon as any point of law arises, they shall be readily heard upon it.

1811.
 REX
 v.
 WHITE.

The trial then proceeded, the defendant himself cross-examining the witness.

To prove the defendant to be proprietor of the newspaper, the counsel for the crown at first, under 38 Geo. 3. c. 78. gave in evidence a certified copy of an affidavit purporting to have been sworn at Dorchester "before J. Whitaker, a distributor, &c.,"—without be-

To render the certified copy of the affidavit made by the proprietor of a newspaper evidence under 38 Geo. 3. c. 78. it must either

appear upon the *jurat* that the person before whom it was made, had authority to take it, or this fact must be proved *aliunde*.

1811.

REX

v.

WHITE.

ing prepared to shew that Whitaker had authority from the commissioners of stamps to take the affidavit.

The defendant objecting that this was insufficient, the point was argued by his counsel, and the counsel for the crown.

Lord ELLENBOROUGH said, if the *jurat* had purported that Whitaker had authority, he would not have required evidence of that fact ; but without such evidence, this certificate was insufficient under the statute.

But it is sufficient evidence of publication at common law, to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title containing the libel was purchased there.

The counsel for the crown then proceeding at common law, gave in evidence the original affidavit signed by the defendant, stating that he was sole proprietor of the newspaper in question, and that it was to be published at *No. 32. Warwick Court*, together with a copy of *The Independent Whig* containing the alledged libel which had been purchased there.

Lord ELLENBOROUGH held this to be sufficient evidence of publication.

The defendant afterwards addressed the Jury, who brought in a verdict of

Not guilty.

Vide Rex v. Hart, 10 East, 94.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Michaelmas Term,

52 GEORGE III.

THIRD SITTINGS IN TERM IN LONDON.

THOMPSON and Another *v.* MORGAN.

1811;
Wednesday,
Nov. 27.

THIS was an action against the defendant as acceptor of a bill of exchange for 81*l.* value received, drawn by the plaintiffs, payable to their own order.

A bill of exchange payable to the order of the drawer, in an action by him against the acceptor, is good evidence under the money counts.

Campbell for the plaintiffs, pointed out a variance between the special count and the terms of the bill; but offered it in evidence under the money counts.

LORD ELLENBOROUGH at first doubted, whether this could be done, it having been held that *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange.

1811.

THOMPSON
and Another
v.
MORGAN.

Campbell contended that this rule only applies where there are three parties to the bill, and the action is brought by the payee or an indorsee. In that case the law supposes that the original money transaction was between the payee and the drawer; the value is considered as received by the drawer; the acceptor is merely a surety, and there is no privity or consideration between him and the payee. But here where the drawer and payee are the same, and there are only two parties to the instrument, it is to all intents and purposes the same as a promissory note, which has been held to be good evidence to support a count for money lent, for money had and received, and upon an account stated. The *value* mentioned in the bill must have passed from the plaintiffs to the defendant, and *primâ facie* must be taken to be money. The bill therefore proved either that 81/. had been lent by the plaintiffs to the defendant, or that the defendant had in his hands 81/. to the plaintiffs' use, or that upon a statement of accounts, a balance of 81/. was found to be due from the defendant to the plaintiffs.

Lord ELLENBOROUGH admitted the bill as evidence under the count for money had and received; but would allow no interest.

The action was undefended.

Vide Boughton v. Frear, ante 29.

 FIRST SITTINGS AFTER TERM IN LONDON.

RODERICK v. HOVIL.

1811.

 Saturday,
 Nov. 30.

THIS was an action by an insurance broker, to recover the sum of 65*l.* 11*s.* 6*d.* due for premiums &c. upon a policy of insurance effected by him for the plaintiff.

The policy was on a ship called the *Countess of Cardigan*, from London to Shields and back to London, for 3 months, in the coasting trade, from 15th February 1810.

In a former action for the same cause, it appeared that the policy had not the proper stamp, and the plaintiff was nonsuited. Since then, the commissioners of stamps had permitted the proper stamp to be affixed to it, on the payment of a penalty.

Puller for the defendant insisted, that the commissioners had no power to do so, and that the instrument was still a nullity. He relied upon 35 Geo. 3. c. 63. § 14. 16. (a)

Garrow

Although a policy of insurance produced at the trial of an action has a sufficient stamp, evidence will be received that it had no such stamp when it was effected, in which case it is a mere nullity, though stamped afterwards by order of the commissioners of stamps; for this is forbidden by 35 G. 3. c. 63., and not authorized by 37 G. 3. c. 136. which extends only to such instruments as could before be legally stamped after they were executed.

(a) Whereby it is enacted, that no Insurance made or entered into in Great Britain in respect whereof any duty is by

1811.

RODERICK
v.
HOVIL.

Garrow for the plaintiff submitted, that as the instrument now appeared to be properly stamped, the Court would not inquire when the stamp was affixed, and that even if the commissioners had exceeded their

this act made payable nor any contract, or agreement for such insurance as aforesaid, shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or in equity, unless the vellum, parchment or paper on which such insurance shall be engrossed, printed or written, shall be stamped with a lawful stamp, to denote the rate or duty as by this act is directed, or to denote some higher rate or duty in this act contained, and it shall not be lawful for the said commissioners of the said stamp duties, or any of their officers, to stamp any vellum, parchment, or paper, with any stamp directed to be provided or used by virtue of this act, at any time after any such insurance as aforesaid or contract for such insurance shall be engrossed, printed, or written thereon, under any pretence whatever. And that it shall not be lawful for any broker, agent, scrivener, or other person, transacting, making, or negotiating any such insurance, as is herein before mentioned, to charge or set against his em-

ployer or employers, any sum of money for brokerage or agency, or for his pains or labour, in transacting, making, or negotiating such insurance, or engrossing, printing, or writing the same, or for any sum of money expended or paid by way of premium, or consideration in the nature of a premium, for such insurance, unless the same shall be engrossed, printed, or written on vellum, parchment, or paper, duly stamped according to the directions of this act, or upon vellum, parchment, or paper, stamped with a stamp or stamps of higher denomination or value than is by this act required; and all and every sum and sums whatever, paid by such employer or employers, on or on any such account, to any broker, agent, scrivener, or other person aforesaid, transacting, making, or negotiating any insurance contrary to this act, shall be deemed to be paid without consideration, and shall remain the property of such employer or employers, his, her or their respective executors, administrators, or assigns

authority and were liable to censure, the stamp could not be deprived of its legal efficacy. But—

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RODERICK

v.

HOVIL.

Lord ELLENBOROUGH said the statute was imperative upon him, and that as the policy was not duly stamped before it was effected, the broker could not recover any thing for effecting it.

Garrow then contended, that the commissioners were authorized to restamp this policy by the subsequent statute of 37 Geo. 3. c. 136. § 2. (a) the object of which must have been to enable them to give validity to an instrument on payment of a penalty, where

(a) 37 G. 3. c. 136. § 2. be stamped without payment enacts, "that where any skin of accumulated penalties exceeding ten pounds besides the duty; that then and in every such case it shall and may be lawful for the said commissioners, or the major part of them, to direct the proper officer or officers, and such officer or officers is and are hereby required to stamp the same, on payment of the duty by law payable for such vellum, parchment, or paper in respect of the instrument, matter, or thing engrossed, printed, or written thereon, and one penalty of ten pounds only for every such skin or piece of vellum, or parchment, or sheet or piece of paper.

1811:
 RODRICK
 v.
 HOVIL.

as in the present instance, the original stamp was insufficient through a mere mistake.

Lord ELLENBOROUGH, however, was of opinion that this statute only applied to the accumulated penalties upon stamping such deeds and writings as could before be legally stamped after they were executed, and that as a policy of insurance was not of that number, the stamp that had been impressed on this instrument since the former trial was of no avail.

Plaintiff nonsuited.

Garrow and *Lawes* for the plaintiff.

Puller for the defendant.

[Attornies, *Wild* and *Sayer*.]

The same doctrine as to the inefficacy of a stamp affixed to a policy of insurance after it is effected, was laid down by the court of K. B. in *Rapp v. Allnutt*, E. T. 1812, in which it was held that where there is a policy on goods to be thereafter declared and valued, and several distinct interests are afterwards declared and valued, the policy is void, if it has not a stamp sufficiently large to cover the whole value declared, calculating the fractional sum of each distinct interest as 100*l*.

 ADJOURNED SITTINGS AT WESTMINSTER.

BAKER v. BIRCH.

1811.

 Tuesday,
Dec. 3.

THIS was an action against the defendant, as drawer and indorser of a bill of exchange for 23/.

It appeared that a few days before the bill became due, the acceptor went to the defendant; told him he should not be able to take it up; said the defendant must do so; and gave him five guineas, being all the money he could command, for that purpose. The defendant received the five guineas, and promised to take up the bill. The bill was not presented for payment to the acceptor till some days after it had been due, and the defendant had not regular notice of its dishonour.

Marryat for the plaintiff contended, that after the defendant had been informed that the bill would be dishonoured, and had promised to take it up, he could not set up the want of notice as a defence; and at any rate, the plaintiff was entitled to recover the 5*l.* 5*s.* as money had and received to his use; — for which he cited *De Bernales v. Fuller*, 2 Camp. 426.

Tapping, contra, insisted, that the information of the dishonour of a bill must be communicated to the drawer

A few days before a bill of exchange becomes due, the acceptor informs the drawer, he will be unable to pay it, says the drawer must take it up, and gives him part of the amount to assist him in doing so: The drawer receives the money and promises to take up the bill accordingly. —

Held that in an action by the indorsee against the drawer, the latter might nevertheless set up as a defence, that the bill was not duly presented for payment, and that he had not regular notice of its dishonour; but that the sum paid him by the acceptor, was money had and received to the plaintiff's use.

1811. drawer by the holder; and that the promise here
 BAKER being on the implied condition that the defendant had
 v. due notice of the dishonour of the bill, he was not
 BIRCH. even bound to pay the plaintiff the 5*l.* 5*s.*, but had a
 right to apply that sum in satisfaction of a debt due to
 himself from the acceptor.

Lord ELLENBOROUGH was of opinion that the
 defendant was discharged upon the bill for want of
 due notice; but that the plaintiff was entitled to re-
 cover the 5*l.* 5*s.* as money had and received to his use.

Verdict accordingly.

Marryat and Campbell for the plaintiff.

Topping for the defendant.

[Attornies, *Williams* and *Lockett*.]

Tuesday,
 Dec. 3.

WM. PRICE v. HARWOOD.

If a person whose
 real name is
William is asked
 before process
 issues against
 him, whether his
 name is not
John, and he
 says it is, he can-
 not maintain
 trespass for what
 is done in exe-
 cution of the
 process against
 him by the
 wrong name.

TRESPASS for breaking and entering the plaintiff's
 house and seizing his goods. Plea, *not guilty*.

The trespass being proved, the defendant by virtue
 of an act of parliament for establishing a court of con-
 science, gave in evidence under the general issue, that
 process issued from the court against the goods of
John Price; that the present plaintiff was the person
 meant

meant in the process, and liable to pay the money; that though his name be *William*, he at one time had *John Price* written over his shop door, and that being asked before the process in question was sued out, whether his name was *John*, he said it was, and they might distrain upon him and be d——d. The process was accordingly sued out against him by the name of *John*, and the defendant entered his house and took his goods in execution.

1811.
PRICE
v.
HARWOOD.

Park for the plaintiff, cited *Cole v. Hindson*, 6 T. R. 234. in which it was held, that to trespass for taking the goods of A. B. a plea of justification by an officer, that he took them under a distringas against C. B. (meaning the said A. B.) to compel an appearance, with an averment that A. B. and C. B. were the same person, could not be supported. So here the defendant could not have pleaded specially that process issued against *John Price* (meaning *William Price*), and therefore the same facts could be no defence under the general issue.

LORD ELLENBOROUGH.—Here the party was known as well by the one name as by the other, which was not averred to be the case in *Cole v. Hindson* (a.) But besides that, I think the plaintiff is barred by having said that his name was *John*, when interrogated

(a) Per Lord Kenyon defendants, as they have not also
The averment in the plea that averred that the plaintiff was
Aquila and *Richard* are the same known as well by one name as
person, will not assist the de- by the other. 6 T. R. 235.

before

1811.

PRICE

v.

HARWOOD.

before the process was issued. He shall not be allowed to avail himself of the mistake which he himself occasioned.

Plaintiff nonsuited.

Park and Espinasse for the plaintiff.

Garrow for the defendant.

[Attornies, *James and Smith.*]

So if the defendant neglects to plead a misnomer in abatement, he may be taken in execution under a *capias ad satisfaciendum* by the wrong name. *Crawford v. Satchwell*, 2 Stra. 1218. But unless the party be known as well by one name as the other, or has by some act acknowledged himself to be the person meant in the writ, a mistake in naming a person to be arrested in a *capias* is fatal, and all

those concerned in making the arrest are trespassers. *Shadgett v. Clipson*, 8 T. R. 328. *Scandover v. Warne*, 2 Campb. 270. And if there be a warrant against J. S., and B. the officer asks A. his name, and A. answers J. S., whereupon B. arrests him, A. may nevertheless maintain trespass and false imprisonment against B.—*Moor* 457. *Hard.* 323.

GAHAGAN v. COOPER.

1811.

Wednesday,
Dec. 4.

THIS was an action on stat. 38 Geo. 3. c. 71. § 2., (*a*)
for pirating a bust of the late *Rt. Honourable*
C. J. Fox.

It is no offence under 38 G. 3. c. 71. passed for preventing the pirating of busts and other figures made and published by statutes, to *sell* a pirated cast of a bust, if the piracy has any addition to or diminution from the original, and it appears to be no offence to *make* a pirated cast, if it is a perfect fac simile of the original.

(*a*) And be it further enacted, that if any person shall within the said term of fourteen years, make or cause to be made any copy or cast of any such new model, copy, or cast, or any such model, copy, or cast in alto or basso relievo, or any such work as aforesaid, or any such new cast from nature as aforesaid, either by adding to or diminishing from any such new model, copy or cast or adding to or diminishing from any such new model, copy or cast, in alto or basso relievo, or any such work as aforesaid, or adding to or diminishing from any such new cast from nature, or shall cause or procure the same to be done, or shall import any copy or cast of such new model, copy, or cast, or copy or cast of such new model, copy or cast in alto or basso relievo, or any such work as aforesaid, or any copy or cast of any such new cast

from nature as aforesaid, for sale, or shall sell or otherwise dispose of, or cause or procure to be sold or exposed to sale, or otherwise disposed of any copy or cast of any such new model, copy, or cast, or any copy or cast of such new model, copy, or cast in alto or basso relievo, or any such work as aforesaid, or any copy or cast of any such new cast from nature as aforesaid, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their hand or hands, in the presence of and attested by two or more credible witnesses; then and in all or any of the cases aforesaid, every proprietor or proprietors of any such original model, copy, or cast, and every proprietor or proprietors of every such original model, or

copy

1811. The 4th count of the declaration, to which alone
 GAHAGAN the evidence was applicable, stated, that the plaintiff
 v. after the passing of the said act, in the said first count
 COOPER. mentioned, and also before the committing, &c.,
 to wit, on the said first day of September 1806,
 made and caused to be made a new model of a certain
 other bust, that is to say, a bust of the said Right
 Honourable C. J. Fox, and which said last mentioned
 model was first published by plaintiff, and plaintiff,
 before the same was published or exposed to sale, to
 wit, &c., did cause his name to be put thereon, with
 the date of the publication aforesaid, by means, &c., he
 the plaintiff became and was, and from thence hitherto
 hath been, and still is the proprietor of the said last
 mentioned new model, and hath for and during all
 the time last aforesaid had, and still hath the sole
 right, property in the same, to wit, &c. — nevertheless
 defendant well knowing, &c., and contriving to in-
 jure the plaintiff so having the sole right and property
 in the said last mentioned model, to wit, on the said
 20th day of October 1809, and on divers other days
 and times, &c., wrongfully and injuriously did expose
 to sale, and cause to be exposed to sale divers, to wit,

copy or cast in alto or basso relievo, or any such work as aforesaid, or the proprietor or proprietors of any such new cast from nature as aforesaid, re- spectively, shall and may, by and in a special action upon the case to be brought against the	person or persons so offending, receive such damages as a Jury on the trial of such action, or on the execution of a writ of enquiry thereon shall give or assess, together with full costs of suit.
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1000 casts of the said last mentioned model, of the said bust so made by plaintiff as last aforesaid, and afterwards, to wit, on the said 20th day of October 1809, and on the said other days and times, &c., did wrongfully and injuriously sell and dispose, and cause and procure to be sold and disposed of part, to wit, 500 of the said last mentioned casts, without the express consent of the plaintiff so being the proprietor of the said model and cast so made by him as last aforesaid first had and obtained in writing signed by plaintiff with his hand in the presence of and attested by two or more credible witnesses, or otherwise; contrary to the form of the statute, &c., whereby, &c., the plaintiff hath been, was, and is greatly injured in his property in the said model and bust so made by him as last aforesaid, and hath lost and been deprived of divers great gains and profits which might and would otherwise have arisen and accrued to him therefrom.

1811.
GAHAGAN
v.
COOPER.

The declaration contained various other counts; but they all alleged that the defendant *made* the pirated bust complained of.

It appeared that the plaintiff had made and published a bust of *Mr. Fox* in the manner above stated; and that a bust, the head of which exactly resembled that of the plaintiff's and had evidently been cast in a mould taken from it, was exposed to sale in the shop of the defendant; but that the pirated bust had drapery thrown over the breast, and the shoulders rounded off; whereas the original was quite naked, and its sides were planes. There was no evidence that

1811.

GAHAGAN

v.

COOPER.

the defendant, who is a carver and gilder, had made the bust which he exposed to sale.

Topping for the defendant objected, that this could not be considered a *cast* of the plaintiff's model, as the drapery and turn of the shoulders constituted a material difference between them. Could it have been proved that the defendant had *made* the bust he exposed to sale, the case might have been brought within the act of parliament, by which the making any copy or cast of a new model, "*either by adding to or diminishing from any such new model*" is prohibited; but the act is so absurdly framed that to *make* a perfect copy or cast is no offence, and it is no offence *to expose to sale or sell* a copy or cast of the model, if there be any addition to or diminution from it.

Garrow for the plaintiff insisted, that the pirated bust might well be considered a *cast* of the defendant's model, if they were substantially the same; and that the difference introduced by the drapery was merely colourable.

LORD ELLENBOROUGH.—The statute seems to have been framed with a view to defeat its own object. But how can I say that one bust is the cast of another, though the head be the same in both, if by the addition of drapery and a dissimilar management of the shoulders, the rest of the figure is different? I think the defendant did not expose to sale a cast of the plaintiff's model; and unless you prove that he *made* the pirated cast by adding the drapery, you support no count of your declaration.

Garrow contended, that the defendant might be presumed to have made the bust which he exposed to sale.

1811.
GARAGAN
 v.
COOPER.

LORD ELLENBOROUGH. — Had he been a modeller or statuary by trade, there might have been some ground for that presumption, but it would be too much to presume a bust to have been made by a man of a different trade, because it is exposed to sale in his shop. These artists must again apply to parliament for protection; and they had better not model the new act themselves as they seem to have done the former. In the mean time, I am obliged to say, though with great reluctance, that the present plaintiff must be nonsuited.

If a person who is not a modeller or statuary exposes to sale a pirated bust, this is not presumptive evidence of his having made it.

Garrow and *Comyn* for the plaintiff.

Topping and *Gaselee* for the defendant.

[Attornies, *Risbards* and *Newcom.*]

DOE, d. DIGBY, v. STEEL.

THIS was an ejectment brought upon the demise of Wriothesley Digby Esquire, as the executor of the last will and testament of the late Dame Elizabeth Mackworth, who was the executrix of the last will

In ejectment by an executor, it is sufficient prima facie evidence that the testator had a chattel interest in the premises, to put in

the defendant's answer to a bill in equity stating that "he believed the testator was possessed of the leasehold premises in the bill mentioned."

1811.

Doe, d.

Digby,

v.

Steel.

and testament of her late husband, Sir Herbert Mackworth, Baronet, deceased, to recover the possession of a house in Henrietta Street, Manchester Square.

In support of the title of the lessor of the plaintiff, there was put in the defendant's answer to a bill in equity, filed against him for a discovery. In this he states, "that he believes that Sir Herbert Mackworth was possessed of the *leasehold* premises in the bill mentioned." —

Topping for the defendant objected, that in the declaration there was only one demise, namely, by Mr. Digby as executor of Lady Mackworth, who was executrix of her husband, and that Mr. Digby was not proved, or even pretended to be, the Heir at Law of Sir Herbert Mackworth, or devisee under any will of Sir Herbert's duly executed so as to pass a real estate. They were therefore bound on the other side to go further, and shew that Sir Herbert's was a chattel interest and not a freehold.

LORD ELLENBOROUGH said, that as against the defendant who had admitted that he believed Sir Herbert to have been in his lifetime *possessed* of the *leasehold* premises in question, he would not require the plaintiff to go further; that the term *possessed*, as contradistinguished from the word *seized* was properly applied to chattel interests; and that although there were freehold leases, still in common parlance the term *leasehold* imported a chattel interest.

The plaintiff then put in probates of the wills of Sir Herbert and Lady Mackworth, and also proved the service upon the defendant, upon the 18th December 1810, of a notice of that date to quit the premises on 24th June following, "*provided the tenancy originally commenced on the 25th day of December, or otherwise*" to quit at the end of the year of the tenancy which "should expire next after the end of half a year from the date thereof."

It was admitted that the tenancy commenced, not on the 25th of December, but on the 24th of June.

LORD ELLENBOROUGH having held that this notice was sufficient, the defendant's counsel produced a second notice from Mr. Digby to the defendant Steel, in August 1811, (after the time when the former notice had determined,) to quit the premises *which Steel then held under him* in fourteen days, otherwise he should require double value.

Topping then contended that the first notice upon which the plaintiff was now proceeding, had been waived by the second; that the demise in the ejectment being laid on the 27th June 1811, the defendant was by the ejectment considered as a trespasser from that time, whereas the second notice recognized a subsisting tenancy in the month of August following, and that the characters of trespasser and tenant at the same time were incompatible.

1811.

Doc, d.
Digby,
v.
Steel.

If after the expiration of a notice to quit, the landlord gives the tenant a fresh notice that unless he quit in 14 days he will be required to pay double value, the second notice is no waiver of the first.

1811.

Doe, d.
DIGBY,
v.
STEEL

Reader and *D. F. Jones*, *contra*, insisted that the first notice was not waived by the second; that the second notice was *diverso intuitu*; that the intent was not to continue the tenancy which had been previously determined at Midsummer 1811, but merely to entitle the lessor of the plaintiff to recover double value for so long a time as the defendant might hold over, and that it must have been so understood by the defendant himself. They cited the cases of *Doe, d. Cherry, v. Batten*, Cowp. 243, and *Doe, d. Williams, v. Humphreys*, 2 East, 237.

LORD ELLENBOROUGH observed, that it certainly appeared to him that the second notice was not intended, and could not be understood to be intended as a waiver of the first, having for its object merely the recovery of double value. It was only a qualified condonation of the trespass. However His Lordship said, he would leave the question as to the *quo animo* to the Jury.

The jury immediately found for the plaintiff.

Reader and *D. F. Jones* for the plaintiff.

Topping and *Lawes* for the defendant.

[Attornies, *Woodcock* and *Griffia*.]

N. I was not in court during the whole of this trial; but I was furnished with the above note by one of the counsel in the cause.

PHILLIPS

1811.

PHILLIPS v. COCKAYNE.

Thursday,
Dec. 5.

THIS was an action against the defendant as acceptor of a bill of exchange, dated 16th of April 1811, drawn by the plaintiff, payable to his own order at two months after date, for 28*l.* "value received in lead." The declaration likewise contained counts for goods sold and delivered. Plea, the general issue.

If an usurious security be given for a legal subsisting debt, although the security is void, the debt is not extinguished.

It was proved that the defendant accepted the bill in question; and that a short time before, he had purchased from the plaintiff lead to the value of 28*l.*

The action was defended on the score of usury. It appeared that immediately upon the sale of the lead, the defendant accepted a former bill for it to the same amount, at two months after date. When this bill became due, he was unable to take it up, and he applied to the plaintiff for a renewal. The plaintiff agreed to renew it, on receiving a premium of 1*l.* This was acceded to; the 1*l.* was paid; the bill now in suit was drawn and accepted, and the former one was delivered up to the defendant.

Garrow for the plaintiff insisted, that at all events he was entitled to recover for the *goods sold*. - If the security was destroyed, the original debt still subsisted.

1811. *Comyn* contrà, maintained, that by the statute of
 PHILLIPS usury, 12 Ann. st. 2. c. 16., the debt and security
 v. were both avoided. The plaintiff by taking usurious
 Cockayne. interest had subjected himself to a penalty of thrice
 the amount of the sum forborne, and could not be
 allowed to recover that sum in a court of justice.

LORD ELLENBOROUGH. — The statute renders void all *bonds, contracts, and assurances* for payment of any principal whereupon there is reserved above the rate of 5*l.* per cent. If there was once a valid subsisting debt, that cannot be destroyed by a void security. The bill here is void by reason of the usury; but the plaintiff is in the same situation as if no bill had ever been given, and may clearly recover the amount of his demand for goods sold and delivered. His Lordship cited and relied upon *Robinson v. Bland*, 2 Burr. 1081, upon the statute of gaming, where it was held that money lent at play might be recovered, although the security for it was void.

Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Comyn for the defendant.

[Attornies, *Railton* and *Richardson*.]

Vide Gray v. Fowler, 1 H. Bl. 463. *Barnes v. Headly*, 2 Taunton, 184.

MARTINS,

1811.

MARTINS, q. t. v. GALLOWAY.

Thursday,
Dec. 5.

THIS was an action on 5 Eliz. c. 4. for setting to work a person who had not served an apprenticeship of 7 years.—The trade was described in different counts of the declaration as that of a *turner*, a *smith*, a *white-smith*, and an *engineer-smith*.

A trade is not within 5 Eliz. c. 4, although several of its intermediate operations were known and practised in England when the act passed, if its ultimate object be a machine or manufacture subsequently introduced or invented.

It appeared that the defendant, a man of great ingenuity, carries on the business of what is called a *machinist*, or *mechanist*, making engines and instruments of various sorts, composed of the different metals. In fabricating these, he uses a lathe like a *turner*, a forge and anvil like a common *smith*, and several of the tools which are considered as belonging to the *white-smith*; but his engines and instruments could not be made by persons of any one of those trades. He employed the young man named in the declaration, (who had not served any apprenticeship) in several parts of his business.

In an action on 5 Eliz. c. 4, for setting to work in a trade a person who had not served an apprenticeship, if the trade is not enumerated in the statute, some evidence must be given that it was known and practised in England when the act passed.

Park for the plaintiff insisted, that as the defendant had set an unqualified person to do particular sorts of work done by *turners* and *smiths*, he had employed him in the trades of a *turner* and *smith*, both of which are enumerated in the act of parliament; and that though the defendant's business when considered in the aggregate, might neither be that of a *turner* or common *smith*, yet it was properly described in the declaration as that of an *engineer-smith*.

Lord

1811.

MARTINS

q. t.

v.

GALLOWAY.

LORD ELLENBOROUGH.—The trade of an *engineer-smith* is not mentioned in the statute, nor do I believe that it existed in the reign of Queen Elizabeth. If it did, the plaintiff should have proved this by books of that period or by some other evidence. Can the defendant then be considered either a *turner, smith* or *white-smith*? He cannot, unless you sever his business into parts; whereas you must view it in the aggregate, not looking to intermediate operations, but the ultimate product of his labour. The business of a watchmaker has been introduced into England since the time of Elizabeth, and is clearly not within the statute. But the watchmaker *turns* some of the works of the watch in a lathe, and makes others by operations very much resembling those of a *smith*.—By the trade of a *turner* in the statute, I rather think is meant only the turning of wood and of ivory. If the turning of metals was at all known here in the reign of Elizabeth, it could not have been a separate trade.—With these observations His Lordship left it to the jury to say, whether upon the evidence, the defendant had set the young man to work as a *turner, smith*, or *white-smith*.

Verdict for the defendant.

Park and *Lawes* for the plaintiff.

Garrow and *A. Moore* for the defendant.

[Attornies, *Chippendale* and *Edwards*.]

Vide Coward v. Maberley, 2 Campb. 112. Pratt v. Frazer, ante 14.

KAY

1811.

KAY v. DUCHESSÉ DE PIENNE.

Thursday,
Dec. 5.

THIS was an action against the defendant as maker of a promissory note, dated 10 July 1804, payable to the plaintiff 3 months after date.

The defence was, that she was not liable to be sued upon the note, *being a married woman*.

It appeared that the Duchesse is a French emigrant; that before the French revolution she lived in France with the Duc de Pienne as his wife; that she was so considered by the French noblesse, and received in that character at the court of Louis XVI.; that the Duc and Duchesse de Pienne came to England and lived some time together as man and wife; but that he left this country in 1803, to enter into the service of Sweden, and has remained abroad ever since.

This was held to be presumptive evidence of the coverture.

Garrow for the plaintiff insisted, however, that the Duc and Duchesse de Pienne being both aliens, from the time when he went abroad she might lawfully contract, and was consequently liable to be sued as a *feme sole*. She was in the same situation as if her husband had abjured the realm. If a British subject leaves the country, he goes *animo revertendi*, his absence is likely to be temporary, and he may at any moment be

A woman by birth an alien, and the wife of an alien, cannot be sued as a feme sole, if her husband has lived with her in this country, although he has left her here and entered into the service of a foreign state.

1811.
 KAY
 v.
 DUCHESSE
 de
 PIENNE.

be recalled by the King. But there is no reason to expect that an alien who has once left this kingdom will ever again come within reach of the process of our courts of justice. Therefore, those who have trusted his wife even for necessities will have no means of recovering their debts, unless she may be sued as a *feme sole*; and if she could not, the consequence would be that she might be starved. In two cases in which this very lady was defendant (*Walford v. Duchess de Pienne* E. T. 1797, 2 Esp. 554, and *Franks v. Duchess de Pienne*, M. T. 1797, 2 Esp. 587.) Lord Kenyon held, that the wife of an alien may contract and be sued as a *feme sole* from the time her husband leaves the kingdom; and under circumstances exactly the same as the present the plaintiffs recovered.

LORD ELLENBOROUGH. — If the husband has never been in this kingdom, the wife of an alien I think may be sued as a *feme sole*. That is the *Duchess of Mazarine's Case*. I don't know whether it was distinctly brought to LORD KENYON'S attention, that the Duc de Pienne had been living with the defendant as his wife within the realm. If so, I cannot subscribe to his opinion. But at the time of those decisions *Ringstead v. Lady Laneborough*, and *Corbett v. Poelnitz* had not been judicially overturned. Since the case of *Marshall v. Rutton (a)*, which restored the old common law upon this subject, I consider it quite clear that a married woman under the circumstances of the present defen-

(a) E. T. 1800. 8 T. R. 545;

dant, is not liable to be sued as a *feme sole*. Her husband who had been living with her in England goes abroad in 1803. How soon he might have returned does not appear. The note is granted in July 1804, and becomes due the October following. Could she *then* have been sued upon it, when her husband had been absent only a twelvemonth, and might have been again living with her here before the cause was brought to trial? Does a woman who has once been in the situation of a *feme covert* in this country become a *feme sole* because her husband has been abroad a year? The Duc de Pienne neither was nor is under any legal disability to rejoin his wife in England. If it was presumed in 1797 that he would never revisit this country, it was a presumption against the fact, for it appears by the evidence in this cause that he was living here in the year 1803. Where the husband has abjured the realm, or is exiled, he cannot return, and the case stands upon perfectly different principles.

1811.
 KAY
 v.
 DUCHESS
 de
 PIENNE,

Plaintiff nonsuited.

In the ensuing term a motion was made to set aside this nonsuit, but the Court fully concurring with the direction of the Chief Justice at *nisi prius*, refused a rule to shew cause.

Garrow and *Abbott* for the plaintiff.

Park and *Reader* for the defendant.

[Attornies, *Bovill* and *Moore*.]

Vide *Marsh v. Hutchinson*, 2 Bos. & Pull, 226. *Boggett v. Frier*, 11 East, 301.

FAULDER

1811.

Monday,
Dec. 9.FAULDER SPR. v. SILK and Another, EXECUTORS
of T. C. JERVOISE Esq. deceased.

Where to an action against executors on the bond of their testator, they plead *non est factum*, and set up lunacy as a defence at the trial, an inquisition taken under a commission of lunacy against the testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence.

DEBT on bond dated 28th July 1808, in the penal sum of 10,000*l.* to secure the payment of an annuity of 500*l.* settled by the testator upon the plaintiff. Plea, *non est factum*.

This action was brought by the direction of the Lord Chancellor, for the purpose of trying whether the testator was in a state of insanity when he executed the bond. To shew that he was, the defendants offered in evidence (among other things) an inquisition taken under a commission of lunacy against the testator in his lifetime, by which it was found that he had been a lunatic from February 1808, without any lucid interval. This was objected to on the part of the plaintiff, as being *res inter alios acta*.

Lord ELLENBOROUGH, however, thought, that although the inquisition was by no means conclusive on the trial of the present issue, it was admissible evidence; and that it would be for the jury after comparing it with the other facts of the case, to determine what weight it was entitled to.—

The plaintiff had a verdict.

The Attorney General, Garrow, Park, and Holroyd for the plaintiff.

Jekyll, Best, and Gurney for the defendant.

Vide Yates v. Boen, Stra. 1104. Sergeson v. Sealy, 2 Atk. 412.

AD.

 ADJOURNED SITTINGS IN LONDON.

1811.

WARWICK v. SLADE and Another.

Wednesday,
Dec. 11.

INDEBITATUS assumpsit by an insurance broker, to recover the sum of 105*l.* paid by him for premiums on a policy effected for the defendants.

The authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip till such time as they have actually subscribed the policy; and if the broker having procured a slip to be written on terms within the scope of his original authority, receives an intimation from his principals that they will not submit to these terms, and afterwards effects the policy and pays the premiums to the underwriters, he can maintain no action against his principals for commission or money paid.

On the 17th November 1810, the defendants sent an order to the plaintiff, to insure 200*l.* on barley and flour on board the ship *Union*, from *Wells* in Norfolk, to *London*, stating that the ship had sailed on the 14th with a fair wind.

There had been an intermediate storm, and under an apprehension that the *Union* might have suffered in it, the plaintiff could not get the insurance done under 50 guineas per cent. On the 17th a slip was written by two underwriters for 100*l.* each at that premium, and between 6 and 7 the same evening the plaintiff called at the defendants' counting house, and left word that he had made the insurance at 50 guineas per cent. premium. The defendants were then from home; but in about an hour after, they sent the plaintiff a letter in the following words:

“ Mr.

1811.
 WARWICK
 v.
 SLADE
 and Another.

“ Mr. Warwick,

“ We are much surprised to hear you have given 50 per cent. on the Union from Wells to London, when you had no such authority from us. We therefore cannot submit to it.

(Signed) “ Slade and Pettitt.”

The stamped policy was not written out or signed till two days after, — when being offered to the defendants, they refused to receive it.

Garrow for the plaintiff insisted, that however high the premium was, his client was bound to get the insurance effected, and would have been liable to an action if he had not done so. The supposed countermand came too late, when he had entered into the agreement with the underwriters, and the slip had been signed. After that, he was bound in honour to pay the premium to the underwriters, and the policy when formally executed must have reference back to the signing of the slip.

LORD ELLENBOROUGH. — I cannot take notice of these honorary engagements. Till the stamped policy was signed by the underwriters, no binding contract was entered into, and the authority of the broker might be revoked. Therefore, supposing the original order would have empowered the plaintiff to give a premium of fifty guineas for a voyage from Wells to London, after the letter he received in the evening of the 17th, his authority was determined. The policy was not then effected. The revenue laws forbid me

to look to what is called the *ship*. The plaintiff afterwards paid the premium in his own wrong, and there is no implied promise on the part of the defendants to reimburse him.

1811.
WARWICK
v
SLADE
and Another.

Plaintiff nonsuited.

Garrow and *Taddy* for the plaintiff.

Parl and *Marryat* for the defendants.

[Attornies, *Croft* and *Lee*]

Visd Farmer v. Robinson, 2 Campb. 339. n.

COTHAY and OTHERS v. TURE and Another.

GOODS sold and delivered.

The plaintiffs are dry-salters at *London*, the defendants dyers at *Leeds*. In December 1809, the defendants wrote a letter to the plaintiffs, desiring them to send down 60lbs. *more of cochineal by the first coach*. The plaintiffs accordingly delivered this quantity of cochineal at the *Bull and Mouth* inn, to be carried to the defendants by a coach that runs from thence to *Leeds*. At the coach office there was a notice stuck up, saying that the proprietors would

Wednesday,
Dec 13.

Where a person in the country gives in order to a tradesman in London with whom he has been in the habit of dealing, to send him down *more goods* by a particular coach, and at the office of this coach there is a notice stuck up, intimating that the proprietors will not be answerable for goods above the value of 5l unless insured it

is enough for the vendor to deliver the goods ordered at this office, although they be above the value of 5l. without insuring them, unless he has insured for the purchaser in former instances.

1811. *not be answerable for any package above the value of 5*l.*, unless entered as such and paid for accordingly. This cochineal was not so entered, although worth about 150*l.*; and it was lost on the way to Leeds. There was no evidence of the manner in which the former cochineal had been sent.*

COTHAY
and Others
v.
TUTT
and Another.

Garrow for the defendants insisted, that they were not liable, as the plaintiffs had not given them a remedy over against the carrier. The plaintiffs must be taken to have been aware of the notice, as well as of the law upon this subject. It was therefore their duty to have entered the cochineal as above the value of 5*l.* Without this, there was no sufficient delivery to the carrier to charge the defendants, and as they had derived no benefit, so they were not liable to make any compensation.

Lord ELLENBOROUGH.—The point made does not properly arise in this cause. The defendants order 60lbs. *more* of cochineal to be sent them. It was therefore incumbent upon them to shew how the former parcel was sent, and whether it was entered and insured as above the value of 5*l.* — Upon the general question I am not now called upon to give any decisive opinion; but as it is in practice so unusual under these notices to enter and insure goods as above the limited value, I shall be inclined to hold that the vendor is not bound to do so, without express instructions for that purpose. Were he to insure of his own accord with the carrier, how far would the purchaser be liable for the heavy additional expence thus incurred?

curred?—In this case the plaintiffs are clearly intitled to a verdict for the value of the goods.

Park and Campbell for the plaintiffs.

Garrow and Copley for the defendants.

[Attornies, *Oldham* and *Lambert*.]

1811.

COTHAIR
and Others.

v.
TUTS
and Another.

PRICKETT, and CARRUTHERS and Others, Assignees of HALLIDAY, a Bankrupt, v. DOWN and Others. Wednesday,
Dec. 11.

THIS was an action against Messrs. Down and Co. the bankers, to recover a balance of 6,651*l.* 3*s.* 10*d.* in their hands, due to the plaintiff *Prickett*, and the assignees of *Halliday*.

Prickett and *Halliday* were in partnership as insurance-brokers. In November 1810, they stopped payment. On the 13th of July 1811, the partnership was dissolved, and on the 16th of the same month a commission of bankrupt issued against *Halliday*. The defendants were advised that they could not legally pay over the balance in their hands, as they had notice of *Prickett* having stopped payment, and if a commission of bankrupt should afterwards be issued against him upon an act of bankruptcy prior to the payment, they might again be called upon, to account for the money by his assignees.

Where two partners have stopped payment, and a commission of bankrupt is taken out against one of them, a debtor to the firm who knows of the stoppage cannot refuse to pay money due to them, on the ground that the other may have committed an act of bankruptcy, in which case his assignees might call upon the debtor to pay a moiety of the money a second time.

1811.
 PRICKETT
 and Others
 v.
 DOWN
 and Others.

Park, for the defendants, pointed out the situation in which they stood, and shewed that they were not protected by Sir Samuel Romilly's act (*a*), which contains a proviso that persons paying money to the bankrupt should have no notice of his having become insolvent, or stopped payment.

Lord ELLENBOROUGH.—The defendants are not under the protection of that act; but before it was passed, they could not have justified refusing to pay the balance in their hands under similar circumstances, to whatever subsequent inconvenience the payment might have exposed them. Till the party has actually become a bankrupt, and a commission has been taken out against him, he may sue his debtors. There may be peril in paying a man who is known to have stopped payment; but that affords no defence to an action for a debt justly due to him.

Verdict for the plaintiffs.

Garrow and *Gaselee* for the plaintiffs.

Park for the defendant.

[Attornies, *Gregson & Co* and *Davies*.]

Vide Foster v. Allanson, 2 T. R. 479.

(*a*) 46 G. III. c. 135. § 1.

1811.

Wednesday,
Dec. 11.

BOYD v. DUBOIS.

THIS was an action on a policy of insurance on hemp, on board the ship *Joseph and Betsey*, from London to the coast of Devonshire. The loss was laid by fire.

The plaintiff's witnesses stated, that while the ship was lying at a place near Torbay, a fire broke out in the hold during the night, which consumed the greatest part of the cargo, but the origin of which could not be discovered.

The defendant's counsel undertook to prove, that the hemp was damaged; that for this reason it was apt to ferment and take fire; that its condition had not been communicated to the underwriters, and that the fire actually had originated in the hemp itself. And they contended, that even if the last circumstance should not be satisfactorily made out, the underwriters would be discharged by the damaged state of the hemp not being communicated to them, since, had they been aware of that, they would have refused to subscribe the policy.

If a fire arises on board a ship from the damaged quality of goods on board which are insured, the underwriters are not liable; but if the loss is not occasioned by the damaged state of the goods on board, the policy is not vitiated by the fact not having been disclosed to the underwriters that the goods were damaged, though that might have a tendency to increase the risk.

LORD ELLENBOROUGH. — If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured can-

1811. not recover for a loss which he himself has occasioned.
 Bayd But I most positively say, that they were not bound to
 v. represent to the underwriters the state of the goods.
 DUBOIS. It would introduce endless confusion and perpetual
 controversies, if such a duty were to be imposed upon
 the assured.

There was no proof that the fire had originated
 from the damaged state of the hemp, and the plaintiff
 had a verdict.

Park and Lawes for the plaintiff.

Topping and Carr for the defendant.

[Attornies, *Jackson and Gibbs.*]

Thursday,
 Dec. 12.

DOE d. PITT v. SHEWIN.

A covenant in
 the lease of a
 house, "to in-
 sure and keep in-
 sured a given
 sum of money
 upon the pre-
 mises during the
 term in some

LEMENT on the forfeiture of a lease, to re-
 cover possession of a house called *Grigby's Coffee-
 house in Threadneedle Street*. The demise was laid on
 the 25th day of April 1811.

sufficient Insurance Office," is not void for uncertainty; but means, that the premises shall be insured
 against fire in some office where insurances against fire are usually effected.

Where there was such covenant in a lease on the part of the tenant, he effected an annual policy
 on the premises with an Insurance Company in the usual printed form, by which it is declared that
 the policy shall be for such longer period as the tenant shall regularly pay, and the Company receive
 the premium, and a space of 15 days beyond the quarter days is given for payment of the premium,
 during which time the Company is liable: The year expired on the 25th of March 1811; but the
 tenant did not pay the premium for a renewal till the 25th of April following: The Company then
 gave a receipt for the premium, stating the insurance to be from Lady-day 1811 to Lady-day 1812.—
Held, that the covenant was broken by reason of the nonpayment of the premium on or before the
 9th of April, and that the lease was forfeited upon a clause of re-entry.

In

In May 1811, the lessor of the plaintiff granted the defendant a lease of the premises in question for 21 years wanting 10 days from Michaelmas 1800, at the rent of 84*l.* per annum. This lease contained the following covenant, for a breach of which the ejectment was brought :

1811.
 Dox dem.
 Pitt
 v.
 Sherwin.

“ And further that she the said *Elizabeth Sherwin*,
 “ her executors, administrators and assigns, shall and
 “ will from time to time, and at all times, during the
 “ continuance of the term hereby granted, insure and
 “ keep insured, or cause and procure to be kept in-
 “ sured, the sum of 800*l.* at the least in some sufficient
 “ insurance-office within the cities of London, and
 “ Westminster upon the said messuage or tenement
 “ and premises hereby demised and every part there-
 “ of.” — A clause of re-entry was added in the usual
 form.

The defendant immediately insured the premises at the *Phoenix Fire-office*, by a policy for a certain number of years, which expired in March 1810. A new annual policy was then effected with the same Company, by which the premises were insured for 800*l.* to the 25th of March 1811. This policy was declared to be for such longer period as the defendant should regularly pay, and the Company should receive the premiums. By printed conditions referred to in the policy, a space of 15 days beyond the quarter-days, was given for payment of the premium, during which time the Company were to be liable. The defendant in fact did not pay the premium for a renewal of this policy

1811.

DOE dem.

PITT

v
SHEWIN.

on the 25th of March 1811, or within 15 days thereafter : but on the 25th of April following, she went to the Phoenix Office, paid the premium, and obtained a receipt in the following form :

		“ Received the 25th day of April
		1811, of Mrs. E. Shewin, the sum
		stated in the margin hereof for one
“ Prem.	0 16	year’s premium on 800 <i>l.</i> insured in
“ Duty	1 0	this office from Lady-day to 1811 to
	————	Lady-day 1812. Received at the
	£1. 16	same time the sum stated in the
	————	margin, for duty on the said policy
		for the same period.

“ R. MILES.”

No accident had happened by fire to the premises in the mean time. A clerk from the *Phoenix Office* stated that it is very common for the annual premium not to be paid till after the expiration of the 15 days ; that it is always received when offered, and that a receipt is given for it in the above form.

Marryat, for the defendant, first objected that the covenant to insure was void for uncertainty, as it did not at all specify what the nature of the insurance was to be. The words are “ *to insure and keep insured the sum of 800*l.* in some sufficient office, within the cities of London and Westminster upon the said messuage and premises.*” This did not shew against what the insurance was to be made, or in what sort of office it was to be effected.

Lord

LORD ELLENBOROUGH. — I think by a reasonable intendment the insurance was to be against fire, and the lessee was bound to insure and keep insured the sum of 800*l*. upon the premises in an office where policies against fire are usually effected.

1811.
 }
 DOE dem.
 PITT
 v.
 SHEWIN.

Marryat then contended, that the covenant had been substantially performed. After the premium had been paid on the 25th of April, the policy must be considered as having been in force from the preceding quarter-day. The annual policy was effected for a year, and such longer time as the premium was paid and received. The office, by receiving the premium, therefore, gave the policy an uninterrupted validity. The landlord had suffered no inconvenience by the premium not having been paid at the day, and if a fire should now happen, he had the security of the policy. Where a forfeiture is to be incurred, covenants are always construed with great strictness, and it may well be said that 800*l*. had been kept insured upon the premises since the granting of the lease.

LORD ELLENBOROUGH. — There was an interval during which the insurance was discontinued. The 15 days, which are an excrescence from the preceding year, expired on the 9th of April. The policy then became extinct, and the landlord was deprived of all protection till the 25th of that month. A fire might have happened in the mean time, and there is no pretence for saying that in that case the *Phoenix Office* would have been liable. For a certain period the landlord ran the risk of fire, and the sum of 800*l*.
 was

1811. was not kept insured upon the premises in any office. It may admit of considerable doubt, whether by the revenue laws the policy could be lawfully renewed by the payment of the premium, after the expiration of the 15 days. At any rate, its existence was suspended from the 9th to the 25th of April. The covenant to insure was therefore broken, and the landlord is entitled to recover at law, whatever relief there may be for the tenant in equity (a).

Doe dem.
Pitt
v.
Shewin.

Verdict accordingly. .

Garrow and *Clarke* Jun. for the lessor of the plaintiff.

Marryat for the defendant.

[Attornies, *Shepherd* and *Allen*.]

(a) In this case the court of Exchequer had granted an injunction on payment of the costs of the action : but these were not paid as they ought to have been, and the defendant became bankrupt. The application for an injunction was then renewed on behalf of the assignees, but refused.

BIETEN

1811.

Thursday,
Dec. 12.

BIETEN v. BURRIDGE and Others.

CASE for maliciously suing out bailable process against the plaintiff, and causing him to be arrested thereupon, and imprisoned and detained in custody.

The defendants, who are bankers at *Plymouth*, supposing by mistake that the defendant was party to a dishonoured bill of exchange in their hands, sued out process against him into the city of London. The bailiff's follower, to whom the writ was delivered, went to the plaintiff, and asked him for payment of the bill of exchange. The plaintiff expressed great astonishment, and declared he had never seen or heard of the bill before. The bailiff's follower then said, he had a writ against him, but he supposed there was some mistake, and as he knew him to be a respectable man, he would go to the attorney and inquire into the matter. The mistake being then discovered, it was explained to the plaintiff, and he was told he need give himself no further trouble. No bail-bond was executed or caption fee taken. The plaintiff, however, some time after insisted upon paying the bailiff a pound-note, and put in bail above, thus incurring an expence of 14*l*.

A. by mistake sues out a bailable writ against B, and gives it to C. an officer to be executed. — C. says to B. he has a writ against him, but B. denying that he owed the money, C. does not take him into actual custody. On inquiry, the mistake is discovered, and B. is told he need give himself no farther trouble in the matter. However, he afterwards puts in bail above, and incurs an expence of 14*l*. — *Held*, that he could not maintain an action against A. for a malicious arrest.

Garrow for the plaintiff contended, that the defendants by their own confession had sued out the process without any reasonable or probable cause; that the law inferred malice from such an act, and that no advantage could be taken of the circumstance of the officer having refrained to take the plaintiff into actual custody. — But

Lord

1811.

BIETEN

v.

BURRIDGE
and Others.

Lord ELLENBOROUGH was clearly of opinion, that the action could not be maintained, as no arrest or imprisonment had been proved; there was no evidence of malice; and the plaintiff had suffered no inconvenience, except what he had voluntarily brought upon himself.

Plaintiff nonsuited.

Garrow and *Espinasse* for the plaintiff.

Park for the defendant.

[Attornies, *Sherwin* and *Tilson*.]

Vide *Arrowsmith v. Le Mesurier*, 2 N. R. 211.

Thursday,
Dec. 12.

SQUIRES v. WHISKEN.

No action can be
maintained upon
a wager on a
cock-fight.

MONEY had and received. *Non assumpsit* except as to 2*l.* 2*s.* and as to that a tender, which was denied by the replication.

Scarlett in opening the plaintiff's case stated, that the action was brought to recover the sum of four guineas. The plaintiff and one *Fordham* laid a wager of two guineas, that each on a given day should produce a game cock, of a given weight, for the purpose of fighting; and that if either failed to produce such cock on such day, the other was to be considered the winner. They accordingly paid two guineas a-piece into the hands of the defendant as a stake-holder. On

the appointed day, the plaintiff produced a game cock, of the requisite qualifications; but *Fordham* made default.

1811.
SQUIRES
v.
WHISKEN.

LORD ELLENBOROUGH. — Is not cock-fighting an illegal sport?

Scarlett said, he had not been able to find any statute by which it is prohibited; and supposing it to come within the general description of *gaming*, still as the sum wagered was under 10*l.*, the action might be maintained.

LORD ELLENBOROUGH. — Cock-fighting must be considered a barbarous diversion, which ought not to be encouraged or sanctioned in a court of justice. I believe that cruelty to these animals, in throwing at them, forms part of the dehortatory charge of judges to grand juries, and it makes little difference whether they are lacerated by sticks and stones, or by the bills of each other. — There is likewise another principle, on which, I think, an action on such wagers cannot be maintained. They tend to the degradation of courts of justice. It is impossible to be engaged in ludicrous inquiries of this sort consistently with that dignity which it is essential to the public welfare that a court of justice should always preserve. I therefore will not try the plaintiff's right to recover the four guineas, and the evidence must be confined to the issue joined upon the tender.

The defendant was not able to prove a legal tender, and the plaintiff had a verdict with nominal damages.

Scarlett

1811. *Scarlett* for the plaintiff.

SQUIRES
v.
WHISKER. *Andrews* for the defendant.

[Attornies, *Birkitt* and *Recks*.]

Vide *M^cAllester v. Haden*, 2 Campb. 438. *Hussey v. Crickitt*,
post, 168.

Friday,
Dec. 13.

CARRUTHERS v. GRAY.

To support an averment in a declaration on a policy of insurance on goods "that the ship with the goods on board when at A. was arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained and confiscated," it is enough to shew that the goods were forcibly taken from on board the ship by the officers of government, and never delivered to the consignees;—without putting in any sentence of condemnation.

THIS was an action on a policy of insurance on goods by the *Antoinette Elizabeth* from London to Petersburg.

The declaration averred that the ship, with the goods on board, when at *Cronstadt*, was arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained and confiscated.

It appeared that on the ship's arrival at *Cronstadt*, her hatches were sealed down, and her cargo was afterwards forcibly unloaded by the officers of government, and never delivered to the consignees.

There is not an implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. Therefore, where from an omission of the captain, the goods insured on a voyage from this country to a foreign port are not mentioned in the ship's manifest as required by 13 & 14 Car. 2. c. 11. and other statutes, but the loss is not occasioned by this defect;—the underwriters are liable.

Scarlett for the defendant contended, that to support the averment as to the loss, it was necessary to prove that the goods had been confiscated, and to put in a sentence of condemnation. *

1811.
CARRUTHERS
v.
GRAY.

LORD ELLENBOROUGH.—Literally to shew *confiscation*, it would be necessary to prove, that the proceeds of the goods came to the *treasury* of the state; but I think the averment is sufficiently sustained by proof, that the goods were forcibly taken possession of by the officers of government.

The defence was, that the goods had not been regularly entered in the ship's manifest for exportation. Stat. 13 & 14 Car. 2. c. 11. § 2., and 8 G. 3. c. 16. require, under penalties and forfeitures, that the captain of every ship before sailing shall deliver in at the custom-house a paper called a Manifest, containing a statement of all the contents of his cargo: and it was proved that the only Manifest delivered by the captain of this ship before sailing on the voyage in question, entirely omitted to mention the 16 bales of merchandize on which the present insurance was effected.

It appeared however, that they had been regularly passed at the custom-house by the shipper; that the cockets were duly made out and filed; that the goods, which might be lawfully exported without paying any duty, were put on board the ship in the common course of business at noonday; and that the omission in the Manifest was solely imputable to the negligence of the captain.

Lord

1811.

CARRU-
THERS
v.
GRAY.

Lord ELLENBOROUGH held, that this omission did not render the voyage illegal, so as to vitiate the policy, and that as it had not occasioned the loss, the underwriters were liable.

Verdict accordingly.

Park and Marryat for the plaintiff.

Scarlett and Adam for the defendant.

[Attornies, *Crowder & Co.* and *Palmer & Co.*]

Vide Bell v. Carstairs, 14 East, 374.

Saturday,
Dec. 14.

BARKER v. MACRAE.

A carrier employed by A. first to carry a sum of money to B. and then the like sum to C., in an action by A. against C., is a good witness from necessity to prove that by mistake he delivered the first sum to C. as well as the second.

MONEY had and received, to recover the sum of
19*l.* 10*s.* 8*d.*

The plaintiff was a shop-keeper at Wansted, and accustomed to be supplied with goods, sometimes by the defendant, and sometimes by one *Copley*, tradesmen in London. In October last, being indebted to *Copley* in 19*l.* 10*s.* 8*d.*, he employed one *Ash*, the *Wansted* carrier, to pay this debt. *Ash* instead of delivering the money to *Copley*, delivered it by mistake to the defendant, to whom the plaintiff owed nearly the same sum. The defendant afterwards sent in his bill, which was paid a second time, through the agency of *Ash*.

To

To prove this case, *Ash* was called as a witness on the part of the plaintiff.

1811.
BAKER
v.
MACRAE.

Garrow for the defendant insisted, that he was interested, and could not be examined without a release. He was *prima facie* liable himself, and he must repay the money to the plaintiff, unless, by his evidence, he could fix the defendant.

LORD ELLENBOROUGH. — I think he is a witness of necessity, and may be examined without a release.

The plaintiff had a verdict.

Park and *Scarlett* for the plaintiff.

Garrow for the defendant.

[Attornies, *Smith* and *Allison*.]

HAMMOND and Others v. DUFRENE.

Monday,
Dec. 16.

THIS was an action on a bill of exchange for 30*l.* 17*s.* 10*d.* dated 25th April 1811, drawn by the defendant upon and accepted by Messrs. Dufrene & Penny, payable at three months after date.

The drawer of a bill of exchange is entitled to due notice of its dishonour if he had any effects in the hands of the drawee at any time between the drawing of the bill and its becoming due.

To excuse the proof of notice to the defendant of the dishonour of the bill, one of the acceptors was

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called,

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 HAMMOND
 and Others
 v.
 DUFRENE.

called, who stated, that when the bill was drawn and accepted they had no effects of the drawer in their hands; but that before the bill became due, he paid a sum of 400*l.* on their account.

Park for the plaintiff insisted, that this was an accommodation bill, and that the drawer therefore was not entitled to notice of its dishonour.

LORD ELLENBOROUGH. — I think the drawer has a right to notice of the dishonour of a bill, if he has effects in the hands of the acceptor at any time before it becomes due. In that case, he may reasonably expect that the bill will be regularly paid, and he may be prejudiced by receiving no notice that it is dishonoured. I am aware that the inquiry has generally been as to the state of accounts between the drawer and drawee when the bill was drawn or accepted; but I conceive the whole period must be looked to from the drawing of the bill till it becomes due, and that notice is requisite if the drawer has effects in the hands of the drawee at any time during that interval. Therefore if the defendant in this case paid a sum of money for Messrs. Dufrene & Penny before the 28th July, you must prove that he had due notice it was not paid on that day by the acceptors.

The case was afterwards brought before the Court, but the direction of the Judge at nisi prius upon this point was not questioned.

Park

Park and *Abbot* for the plaintiff.

Beard for the defendant.

[Attornies, *Swain & Co.* and *Blacklock*.]

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 HAMMOND
 and Others
 v.
 DUFRENE.

Vide Legge v. Thorpe, 2 Campb. 315. *Thackray v. Blackett*,
post, 164.

BARFOOT and Others, Executors of JOHN WILKES, Thursd^y,
Dec. 19.
 v. GOODALL, DICKENSON the Elder, DICKENSON
 the Younger, and FISHER.

MONEY had and received.

Goodall and the two *Dickensons* pleaded their bankruptcy, which was not disputed; *Fisher*, the general issue of *non assumpsit*; and the only question was, whether he was liable as a partner with the others? A change of
partners in a
banking-house is
sufficiently no-
tified to the cus-
tomers of the
house, by a
change in the
printed cheques.

The defendants were formerly bankers, with whom *Mr. Wilkes*, the testator, kept cash for a considerable number of years. *Fisher* was a partner in the banking-house at the time *Wilkes*'s account was opened. *Fisher*'s name appeared at the beginning of the cash-book in which *Wilkes*'s account was kept, and no alteration of firm was mentioned in it. In point of fact, *Fisher* ceased to be a partner in 1799. No advertisement

1811. mentioning the circumstance was published in the
BARFOOT Gazette, nor was any circular notice sent round to the
and Others customers of the house. In 1805 the partnership
 v. became bankrupt with a balance in their hands belong-
GOODALL ing to the testator of about 2000l.
and Others.

Park for the plaintiffs contended, that *Fisher* continued liable as a partner, and he relied upon *Gorham v. Thompson*, Peak. Caf. 42, where it was decided, that when partners dissolve their partnership it is incumbent on them to publish notice of such dissolution in the Gazette, or they will be liable to creditors; and *Graham v. Hope*, Peak. Caf. 154. in which Lord KENYON held that even notice in the Gazette is not sufficient to affect a creditor, without evidence that he had read it.

It appeared, however, that when *Fisher* retired, the printed cheques were changed from "*Dickenson, Goodall & Fisher*," to "*Dickenson, Goodall & Co*;" and that afterwards when *Dickenson* the younger, became a partner, the printed cheques were again changed to "*Dickenson, Goodall and Dickenson*." A great number of cheques in all these forms were produced, and proved to have been filled up and signed by the testator.

It was still maintained on the part of the plaintiff, that *Fisher* was liable, as he had given no express notice of his withdrawing from the partnership, as the attention of a customer might not be drawn to the form of the printed cheque, and there might
 for

for various reasons be a change in the firm, while the partners themselves remained unchanged.

1811:

BARFOOT
and Others

v.
GOODALL
and Others.

LORD ELLENBOROUGH. — I think the change in the partnership was sufficiently notified by the change in the cheque. It is the habit of banking-houses to intimate in this manner that a partner has been introduced or has retired. When the testator had been accustomed to draw upon cheques furnished him with the name of *Fisher*, and others were sent him with the name of *Fisher* omitted, before using these it became him to inquire what change had really taken place; and when he did continue to use them, I must presume that he was perfectly well aware *Fisher* had retired, and that he continued to deal with the house upon the credit of the other partners. A circular letter to the customers might be more regular; but I think a change of cheque is sufficient notice of the dissolution of partnership to those who have drawn cheques addressed to the new firm.

Plaintiff nonsuited.

Park, Richardson, and Fitzgerald for the plaintiff.

The *Attorney General, Garrow, and Gurney* for the defendant.

[Attornies, *Bicknell and Andrews*.]

. *Vide Newsome v. Coles*, 2 Campb. 617.

1811.

Saturday,
Dec. 21.

HARMAN and Others v. KINGSTON.

Where there is a policy on goods as may be thereafter declared and valued, the declaration of interest, to be available, must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss: But the declaration of interest is not a condition precedent; and if none is made, the policy is then open instead of being valued, and upon proof of interest at the trial, the assured will be entitled to recover.

THIS was an action on a policy of insurance dated 1st August 1810, on goods by the ship *Maria*, “at and from Gottenburgh to port or ports of discharge in the Baltic.” By a memorandum at the foot of the policy, the insurance was declared to be “on sugar and cotton *as might be thereafter declared and valued.*”

The declaration alleged that the goods were duly declared and valued before the loss.

A clerk of the plaintiffs stated that on the 2d of October 1810, he wrote out and signed, by order of the assured, a specification of interest with a valuation of the goods insured on a separate piece of paper, which he wafered to the policy; but he could not swear that he had shewn it to any of the underwriters or to any other person, till after intelligence of the loss had been received.

The *Attorney General* objected, that this private memorandum of the clerk, which he had kept a secret from all the world, could not be considered a declaration of interest within the meaning of the policy. The object was to inform the underwriters before a loss happened of the particular goods insured, and of the value put upon them, that they might be protected from

from any sinister practices on the part of the assured. But if this declaration were sufficient, it would be unnecessary to communicate any declaration till the day of trial, or there might be twenty declarations privately written and signed before the loss, and that one afterwards produced which according to the event would best suit the purpose of the parties.

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HARMAN
and Others
v.
KINGSTON.

Garrow and *Bosanquet*, *contra*, maintained that it was merely a question as to the credit of the witness. If he was believed, there had been a declaration made on the 2d of October, and the loss did not happen till the 18th of November. The declaration of interest did not require the assent of the underwriters; this policy did not stipulate, as is sometimes done, that it should be authenticated by their initials; had it been shewn to them on the 2d of October, they could not have objected to it; and therefore if the witness spoke true, they were precisely in as good a situation as if on that day it had been shewn to every one of them. *Henchman v. Offley*, 2 Hen. Bl. 345 *in notis*, was cited as in point.

LORD ELLENBOROUGH. — A declaration necessarily imports two parties, the person who makes it, and the person to whom it is made. How can I consider an uncommunicated instrument a declaration? Had it been communicated to any person, or if it had been written on the policy, so that the party could not recede, perhaps that would have been sufficient. I allow that a declaration of interest is no contract, and does not require the assent of the underwriters; but it must

1811.

HARMAN
and Othersv.
KINGSTON.

be communicated in such a manner that the assured cannot recede from it. Here there would have been no evidence that this instrument ever existed if it had suited the assured to destroy it, or to substitute another in its place.

Garrow then proposed to prove the loading of the goods, and their value, as in the common case of an open policy.

Lord ELLENBOROUGH at first entertained some doubts whether this could be done, and whether upon a policy of this sort the declaration of interest is not a condition precedent, which must be fulfilled by the assured before the liability of the underwriters attaches: but after further consideration, His Lordship said, I have now fully made up my mind, that where there is an insurance on goods as may be thereafter declared and valued, this gives the assured a power by duly declaring and valuing before the loss to make it a valued policy; but that if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial.

The Attorney General.—My lord, I feel myself bound entirely to subscribe to that doctrine; and had I been aware that the plaintiffs could prove the interest, I should not have made any objection.

In an action on
a policy of in-
surance it is no

defence under the general issue, that the persons interested who were neutrals when the policy was effected and the loss happened, had become alien enemies before action brought.

The plaintiffs' case being made out, the defence set

up was, that the persons interested (six in number) are now resident at *Bremen*, which is annexed to France, and are therefore alien enemies, so as to be incapable of taking advantage of a licence granted to them when they stood to this country in the relation of neutrality.

It was proved that they were all living at Bremen in the latter end of the year 1810, and the *Attorney General* contended, that till the contrary was shewn it must be presumed they had lived there ever since.

LORD ELLENBOROUGH.—I think this is no defence upon the general issue. The fact of the persons interested having become alien enemies since the loss, only goes to suspend the remedy, and ought to have been pleaded in abatement.—Besides, you have given no evidence where these persons were born, nor proved that they were living in a hostile territory at the time of action brought. You have not shewn them to be enemies either by birth or by domicile. How do I certainly know that they were not all British subjects who left Bremen as soon as they could after that place was usurped by the French, and are now carrying on trade within the realm of England? A defence of this sort which goes merely in disability of the person is to be made out by the strictest proof.

Verdict for the plaintiffs.

A new trial was afterwards moved for on the ground that the persons interested were become alien enemies.

A rule

1811.

HARMAN
and Others
v.
KINGSTON.

To prove that a person was an alien enemy at the time of action brought, it is not enough to shew that he was some time before domiciled in a territory which has become hostile, without shewing that he was a native of that territory.

1817. A rule to shew cause was granted, but afterwards discharged, the whole Court being clearly of opinion that this not being a perpetual bar to the action, it was no defence upon the general issue.

HARMAN
and Others
v.
KINGSTON.

Garrow and Bosanquet for the plaintiffs.

The *Attorney General, Carr, and Richardson* for the defendant.

[Attornies, *Smith and Gregg & Corfield*.]

Monday,
Dec. 23.

BAGLEHOLE v. WALTERS.

It is to be said with all faults, that the plaintiff is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser.

THE first count of the declaration stated, that the plaintiff on &c., at &c., bargained with the defendant to buy of him a certain ship, which the defendant then and there knew not to be a good, sound vessel fit for sea, but on the contrary thereof to be unsound, and to have 26 of her floor timbers broken; nevertheless the defendant by falsely and fraudulently *warranting* the said ship to be a good sound vessel fit for sea, afterwards &c., falsely and fraudulently sold two-third parts of the said ship to the plaintiff. — The 2d and 3d counts stated the warranty to be, that the ship was *in excellent condition*, and that she was *sea-worthy*. The 4th averred, that the defendant knew the ship was not sea-worthy, but on the contrary thereof had 26 of her floor timbers broken, nevertheless by falsely and

and fraudulently *concealing* from the plaintiff that the ship was not sea-worthy &c., falsely and fraudulently sold two-thirds of her to the plaintiff. The 5th count was for falsely and fraudulently *representing* to the plaintiff, and inducing him to believe that the ship was sea-worthy; and the last count for falsely and fraudulently representing to the plaintiff, and inducing him to believe that she was in *excellent condition*, — both laying a *scienter*.

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Plea, the general issue. .

The defendant in May last being about to sell the vessel in question, printed the following particulars of sale, a copy of which was delivered to the plaintiff.

“ For Sale.

“ The Good Brig Iris.

“ Burthen per register 208 tons : will carry 17 keels
“ of coal and glass, or 300 loads of timber : has lately
“ delivered a cargo of sugar from the West Indies in
“ *excellent condition* : is well found in all kind of stores
“ which are in good condition. Hull, masts, yards,
“ standing and running rigging, *with all faults* as
“ they now lie.”

The plaintiff then purchased two-thirds of the ship, which were conveyed to him by the defendant in the common form.

The *Attorney General* undertook to prove, that at the time of the sale the ship had several secret defects in her; that these were known to the defendant, and that he did not disclose them to the plaintiff. He maintained that the defendant was bound to do so, although

1811.
 BAGLEHOLE
 v.
 WALTERS. although the ship was to be taken *with all faults*; and he relied upon *Mellish v. Motteux*, Peak. Caf. 115, where Lord KENYON, under circumstances precisely like the present, held, that the feller of a ship is bound to disclose to the buyer all latent defects known to him, observing "that the terms to which the plaintiff acceded of taking the ship *with all faults*, and without warranty, must be understood to relate only to those faults which the plaintiff could have discovered, or which the defendants were unacquainted with."

LORD ELLENBOROUGH. — I cannot subscribe to the doctrine of that case, although I feel the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold *with all faults*, I think it is quite immaterial how many belonged to it within the knowledge of the feller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. I may be possessed of a horse I know to have many faults, and I wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him *with all faults*. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be

most inconvenient and unjust if men could not by using the strongest terms which language affords obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud, unless the seller by positive means renders it impossible for the purchaser to detect latent faults; and I make no doubt that this will be held as law when the question shall come to be deliberately discussed in any court of justice.

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WALTERS.

The *Attorney General* then said, he was instructed he should be able to shew, that when the defendant himself purchased this ship, her flooring was taken up, and her seams were open, so that he must have seen her floor timbers broken and her knees decayed; and that before exposing her to sale to the plaintiff, he purposely nailed down the flooring, and closed the seams, that these defects might not be discovered.

Lord ELLENBOROUGH said, he would receive this evidence. — It appeared, however, that no artifice of this sort had been employed, and that while the ship was on sale, those who were in treaty for her had a full opportunity of examining her condition. — Whereupon the *Attorney General* submitted to a nonsuit.

The *Attorney General*, *Garrow*, and *Marryat* for the plaintiff.

Park and *Lawes* for the defendant.

[*Attornies, Rogers and Seward.*]

Vide *Parkinson v. Lee*, 2 East, 314. and the authorities there collected.

1811.

Monday,
Dec. 23.

ROBINSON v. TOURAY.

Where there is a policy on goods by ship or ships to be thereafter declared, if the broker by mistake makes a written declaration upon goods by a wrong ship, to which the underwriters put their initials; he may afterwards in compliance with the orders of the assured, declare upon goods by another ship, without the assent of the underwriters, and without a fresh stamp.

THIS was an action on a policy of insurance dated 17th July 1810, at and from Archangel to Great Britain, on goods to be thereafter valued and declared, by ship or ships. The interest was in *Brandt, Rodde & Co.* of Archangel.

On the 16th of October the brokers called on the underwriters to subscribe the following declaration :

“ The interest attached to this policy is hereby declared to be shipped on board the *Tweende Venner* and the *Neptunus*.”

The defendant and the other underwriters put their initials to this declaration. However, it was a mere mistake on the part of the brokers, *Brandt, Rodde & Co.* having no goods on board either of these ships, and having given no orders to declare upon them. On the 7th of November, the brokers being directed to declare upon the *America*, called upon the underwriters to subscribe a declaration in the following form :

“ The declaration of interest on this policy made 16th October by the *Tweende Venner* and *Neptunus* is hereby cancelled, and in lieu thereof, the following cargo *per America* is declared to form the interest, and is valued as follows, &c.”

The defendant did not sign this last declaration, although it was signed by several of the other underwriters.—The cargo of the *America* was lost by the perils of the sea.

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v.
TOURAY

Garrow for the defendant insisted, that the policy never attached upon the *America*. When the interest was declared upon the *Tweende Venner* and the *Nep-tunus*, it was the same as if these two ships had been named in the policy, and another ship could not be substituted without the defendant's assent. — The stamp laws likewise prevented the substitution, even had it been made with the full assent of the defendant and all the other underwriters. Immediately upon the first declaration of interest, the policy was complete; and the underwriters would have been liable upon the ships therein specified, had they brought any goods belonging to *Brandt, Rodde & Co.* After that, there could be no alteration in the subject matter insured without a fresh stamp.

LORD ELLENBOROUGH. — I am of opinion that the declaration of interest does not require any assent on the part of the underwriters. They put their initials to it, not for the purpose of expressing their assent, but to authenticate the declaration, and to prevent fraud in changing the subject matter intended to be covered by the insurance. The contract between the parties is complete when the underwriters have signed the policy. The declaration of interest is the mere exercise of a power conferred upon the assured. It is generally put upon the policy for convenience; but this

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TOURAY.

this is not necessary; nor is there any necessity for its being in writing. There was here a blunder in the names of the ships first declared. If this was without fraud and without prejudice to the underwriters, I think it might be corrected without the assent of the defendant, and without a fresh stamp. It is the same as if a verbal message had been sent by a porter who misdelivered it. The first declaration did not form any part of the contract. It was a corrigible mistake, and it was corrected. The policy therefore attached upon the cargo of the *America* in the same manner as if no prior declaration had been made.

Another defence set up was, that the licence did not protect alien enemies. The plaintiff, however, had a verdict.

In the ensuing term *Garrow* moved for a new trial, on both grounds, taken at *nisi prius*. But upon the first the COURT refused a rule to shew cause, being clearly of opinion, that under the circumstances of the case, the policy did attach on the cargo of the *America*.

The *Attorney General*, *Park*, and *Caslee* for the plaintiff.

Garrow and *Nolan* for the defendant.

[Attornies, *Griffen & Co.* and *Pafmore*.]

Vide Harman v. Kingston, ante 150.

BROWN

BROWN v. CARSTAIRS.

Tuesday,
Dec. 24.

THIS was an action on a policy of insurance on goods at and from *London* to *Archangel*. The duration of the risk was described in the words of the common printed form — “until the goods should be there discharged and safely landed.”

Upon a common policy on goods, the underwriters are discharged if the goods are landed at the port of destination by the officers of government there, and are lodged in the government warehouses, if this be the usual mode in which goods are landed at that port, although the goods insured are afterwards confiscated by the government, and are never in the possession of the consignees.

The declaration averred that the ship arrived at *Archangel*; but that before the goods were discharged or safely landed, they were seized and detained by the persons exercising the powers of government there.

As soon as the vessel arrived at *Archangel* her hatches were sealed down, and a custom house officer remained constantly on board. Leave was refused to unload the cargo for several weeks; and at last it was unloaded into praams or lighters belonging to the government, under the inspection of an officer, and lodged in a government warehouse, where the consignees had no controul over it, and were not even permitted to see it. The whole was afterwards condemned, on the ground that the ship had come from *London*, instead of *Teneriffe* as was represented by the simulated papers which she carried.—It appeared, however, to be the uniform course of transacting business at *Archangel*, that when a ship arrives her hatches are sealed down, that a custom house officer remains on board till she is unloaded, and that the goods must be carried in the first instance to the

1811. government warehouses, where they remain till the
duties are paid.

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v.

CARSTAIRS.

The *Attorney General* for the plaintiff insisted, that the goods in question never had been *safely landed*, and that the underwriters were responsible for the loss, which must be referred back to the time when the cargo was discharged from the ship into the government praams under the inspection of a government officer. By *safely landed* must mean, landed so as to be once in the possession and under the controul of the consignees. It must be a landing which is available and beneficial to the persons interested. Had the goods been captured at sea and carried into *Archangel*, in one sense they would have been safely landed there; and it was only in that sense they could be said to have been safely landed as the case actually stood. He referred to the case of *Waples v. Eames, Str. 1243*, in which Lord C. J. LEE is stated to have held, that a ship is not to be considered as having been moored 24 hours in good safety, till she has been so long in a condition to deliver her cargo. On the same principle, goods could not be said to have been safely landed, which had never reached the hands of the consignees.

LORD ELLENBOROUGH.—The question here is, whether these goods were seized and detained by the Russian government *before* they were discharged and safely landed. I see no evidence of such seizure or detention. The goods were landed according to the usual course of trade at the port of *Archangel*. This is all the underwriters undertook for. The policy says
nothing

nothing of the goods being in the possession or under the controul of the consignees. At almost every port in Europe where a revenue is raised upon goods imported, the consignees have not the dominion over the goods till the duties are paid, and the goods may at any time be seized if they are found to be contraband. But if the goods are once landed in the usual course of business, the underwriters on such a policy as the present are not liable for any subsequent loss. It was meant to indemnify against *marine* not *terrene* perils. If persons would be secured against the cupidity of foreign governments, or the enforcement of fiscal regulations when the goods are once ashore at the port of destination, the instrument must be differently framed. This policy cannot receive the extension contended for, without the greatest injustice to the underwriters, and that useful body of men must abandon the practice of insuring altogether if new risks are thrown upon them for which they never became responsible.

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BROWN
v.
CARSTAIRS.

Verdict for the defendant.

The *Attorney General*, Garrow and Marryat for the plaintiff.

Topping, Scarlett and Campbell for the defendant.

[Attornies, Crowder & Co. and Blunt & Bowman.]

Vide Bell v. Bell, 2 Campb. 475.

1812.

Saturday,
Jan. 11.

THACKRAY v. BLACKETT.

The drawer of two bills of exchange, before they became due received notice that they were accidentally destroyed, and was called upon to give others in their stead according to the statute 9 & 10 W. 3. c. 17. — When the bills were drawn, he had no effects in the hands of the acceptors, but before either was due, the acceptors were indebted to him to an amount less than one of the bills, and became bankrupt. Held, that he was nevertheless entitled to notice of the dishonour of both bills.

THIS was an action on two bills of exchange drawn by the defendant on *Preston & Sons*, payable to his own order, and indorsed by him to the plaintiff. The first for 1833*l.* 7*s.*, was dated 10th October 1809, the other for 1835*l.* 18*s.* 9*d.*, the 17th of October 1809, and both were at 6 months after date.

After the bills had been accepted and indorsed, and some time before either was due, they were left for payment with the acceptors, who by mistake destroyed them. The plaintiff immediately gave notice of this circumstance to the defendant, and required him, as drawer, to give new bills in their stead according to the statute 9 & 10 W. 3. c. 17. This the defendant refused to do. In a few days after, *Preston & Sons* became insolvent. The bills, however, as they respectively became due, were presented for payment; but no regular notice was sent to the defendant of their dishonour. The bills were drawn merely for the defendant's accommodation; but before they became due, he had contracted engagements on account of *Preston & Sons* to the amount of about 1000*l.*, and they were so much indebted to him at the time when they stopped payment. — The objection being taken, that the defendant was discharged for want of due notice of the dishonour of the bills,

The *Attorney General* for the plaintiff contended, that under the circumstances of the case no such notice was necessary. Before the bills were due the defendant

defendant was informed they were destroyed; and being likewise aware that the acceptors were insolvent, he must have known perfectly well that they could not be paid. Notice of the dishonour of the bills would have given him no information, and he could not possibly have suffered any prejudice from the want of it. At any rate, the objection could only apply to the first bill; for that alone would absorb the whole balance due from the acceptors, and leave the other a pure accommodation bill from its date till the moment it became due.

1812.
THACKRAY
v.
BLACKETT.

LORD-ELLENBOROUGH. — It is well settled that the insolvency or bankruptcy of the acceptor does not dispense with due notice of the dishonour of the bill being given to the drawer. Then, does it make any difference in this case that the bills were destroyed before they became due? I think not; for they might still have been paid with or without an indemnity, and the defendant not hearing that they were dishonoured, might have been prevented from pressing his remedy against the acceptors. The excuse of want of effects in their hands, I think, is equally unavailing as to both bills. I cannot make any distinction between the two. If there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills became due, I cannot say that he must necessarily have been aware before hand that either of them would be dishonoured. Judges of great authority have doubted of the propriety of the rule laid down in *Bickerdike v. Bolman*; and I certainly will not give it any extension.

Plaintiff nonsuited.

1812.

THACKRAY
v.
BLACKETT.

In the ensuing term the *Attorney General* was refused a rule to shew cause why there should not be a new trial, all the Judges being of opinion that the defendant was entitled to notice of the dishonour of both bills.

The *Attorney General*, *Garrow* and *Copley* for the plaintiff.

Park, *Topping* and *Holroyd* for the defendant.

[*Attornies, Lambert and Flexney.*]

Vide Hamond v. Dufresne, ante 145.

Saturday,
Jan. 11.

CLEGG v. LEVY.

If a stamp is necessary to the validity of an agreement made in a foreign country, an agreement made there, unless it has such stamp, cannot be received in evidence in our courts of justice. But it is incumbent upon the party who objects to the validity of the agreement, to

prove the law requiring the stamp, by an authenticated copy, if it be in writing, and if not, by the testimony of a witness acquainted with the laws of the foreign country.

TO an action for goods sold and delivered, the principal defence set up was, a partnership between the plaintiff and defendant in respect to the goods in question. To prove this, an unstamped agreement was put in, which had been signed by the parties at *Surinam*. The witness who proved the plaintiff's signature to it, had resided as a merchant in *Surinam*, and stated that in that colony all agreements must be stamped to be of any validity, and that there is a written law of the colony to this effect,

Lord

LORD ELLENBOROUGH. — I should clearly hold, that if a stamp was necessary to render this agreement valid in *Surinam*, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over. But I must have more distinct evidence of the law of *Surinam* upon this subject than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman supposes that it applies to all agreements, it may possibly contain an exception, like our own stamp act, as to agreements for the sale of goods, wares, and merchandizes. In the case of *Bobtlingk v. Inglis (a)*, respecting the right to stop in transitu in *Russia*, Lord KENYON required the written law of *Russia* upon this subject to be given in evidence. I will therefore admit this agreement to be read, unless you prove in the same way, that by the law of *Surinam* a stamp was necessary to give it validity.

1812.
CLEGG
v.
LEVY.

The agreement was read accordingly, but did not apply to the goods in question; and the plaintiff had a verdict.

Topping and *Comyn* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Granch* and *Howard*.]

(a) 3 East, 381. and see 1 East, 515.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM IN LONDON.

1811.

HUSSEY v. CRICKITT.

An action may be maintained upon a wager of *a rump and dozen*, whether the defendant be older than the plaintiff.

When a dinner is ordered at a tavern by the authority of two persons who have laid a wager of *a rump and dozen*, if the winner pays the bill, he may maintain an action against the loser for money paid to recover the amount.

THIS was an action upon a wager of *a rump and dozen*, whether the defendant was older than the plaintiff.

The declaration contained several special counts upon the wager, and the usual money counts.—Plea, *the general issue*.

• It appeared that the wager was laid in May 1809, when the plaintiff, the defendant and seven other gentlemen were dining together in *Furnival's Inn Hall*. Nothing further was done in the business till the 8th of June in the following year. The parties then meeting again in the same place, it was resolved that each should name a friend for the purpose of appointing a day when the question should be decided by the production of the registers of baptism, and of ordering a dinner at a tavern for *the rump and dozen*. The plaintiff accordingly named *Mr. Hurd*, and the defendant *Mr. Keene*, who agreed in appointing the

14th of the same month, and ordered a dinner on that day for the parties and the other gentlemen present when the bet was laid, at the *Albion* tavern in *Aldersgate Street*. At the day appointed, it was found that the defendant was six years older than the plaintiff. He had notice of the dinner, but did not attend. The bill which amounted to 18*l.* was paid in the first instance by *Mr. Hurd*. He was repaid, however, by the plaintiff before action brought.—The witnesses stated that *a rump and dozen* means a good dinner and plenty of wine for the persons present.

1811.

 HUSSEY
 v.
 CRICKITT.

Vaughan Serjeant, for the defendant insisted, that no action could be maintained upon such a wager on account of its uncertainty, frivolity, ludicrous nature, and immoral tendency. He relied upon *Brown v. Leeson* 2 H. Bl. 43, in which Lord LOUGHBOROUGH refused to try an action on a wager, "whether there are more ways than six of nicking seven on the dice, allowing seven to be the main, and eleven a nick to seven," and *Henkin v. Gerfs*, 2 Campb. 408, in which Lord ELLENBOROUGH in the same way refused to try an action on a wager between two attornies, "whether a person may be lawfully held to bail on a special original for a debt under 40*l.*" At any rate, the plaintiff could not be entitled to more than the value of one dinner to be eaten by himself. The amount of the tavern bill could in no case be considered money paid by him to the defendant's use.

Best, Serjeant, and *Campbell*, contrà, insisted, that the case before Lord LOUGHBOROUGH proceeded merely

1811. on this ground, that the wager was respecting the
 HUSSEY mode of playing at *Hazard*, a game forbid by act of
 v. parliament; and in *Henkin v. Gerts* nothing more was
 CRICKITT. laid down by Lord ELLENBOROUGH, than that an
 action cannot be maintained on a *point of law* in which
 the parties have no interest. But the general rule is,
 that wagers are lawful; and this does not come within
 any of the exceptions to the rule, not being against
 public policy, not injuring the character or feelings of
 a third person, not leading to indecent evidence, and
 having no tendency to immorality. The question
 here was quite harmless. Whether or not a bet upon
 the age of a stranger would be legal, there could be
 no objection to two gentlemen betting on their own.
 And instead of any public prejudice arising from the
 thing betted, it is for the public benefit to pro-
 mote conviviality and good humour. Neither could
 it be said that the plaintiff's loss even of his own share
 of the entertainment which the defendant had promised
 to give, was frivolous in the eye of the law. It was
 lately decided in the Exchequer Chamber, that the
 loss of the hospitality of friends is a sufficient temporal
 damage to found an action. *Moore v. Meagher*, 1
Taunt. 39. The ludicrous nature of the wager is too
 loose a ground to proceed upon; and till the law of
 England, in imitation of the civil law, (a) shall refuse
 to take cognizance of *sponsiones ludicræ* altogether,
 it will be very difficult to decide which are sufficiently

Although the rule of the civil law was, that no gaming or betting should be permitted, to this there were several exceptions, among which there is one bear-

ing some resemblance to a wager of a *rump and dozen*: "Quod in convivio, vescendi causâ ponitur, in eam rem familiæ ludere permit- titur," Dig. lib. xi. tit. v. 4.

grave, and which are too laughable for the consideration of a court of justice. Actions have been tried and sanctioned by the greatest Judges who have sat in Westminster Hall, upon wagers quite as ludicrous as the present. Thus in *Pope v. St. Leger*, 1 *Salk.* 344, an action was tried before Lord HOLT upon a wager, "whether a person playing at backgammon having stirred one of his men without moving it from the point, was bound to play it;" and that venerable Judge called in the assistance of the *Groom Porter* to decide the controversy. So Lord KENYON held, that an action might be maintained, to recover the sum of 3*l.* 10*s.* which the plaintiff had won from the defendant at the game of *All Fours*, the rules of which must have been explained and proved during the trial: *Bulling v. Frost*, 1 *Esq. Cas.* 236. And in *M'Allester v. Haden* 2 *Campb.* 438, Mr. Justice LAWRENCE, a Judge no wise inferior in learning or ability to either of the other two, without any hesitation allowed the plaintiff to recover in an action upon a wager of "six to four that *Bob Booty* should win the King's plate at the next *Litchfield Races*," although this question might have involved all the laws of the turf. — There could be as little doubt that the amount of the bill was money paid to the defendant's use. *Hurd* paid as the agent of the plaintiff, who was liable to the landlord for the whole. Therefore as soon as the plaintiff had repaid *Hurd*, he had a right to come upon the defendant for an indemnity. This was not a voluntary but a compulsory payment by the plaintiff of a sum of money for which the defendant was liable. The law therefore implied a promise on the part of the defendant to repay it to the plaintiff, as money advanced at his request.

1811.
 HUSSEY
 v.
 CRICKITT.

Sir

1811:

HUSSEY

v.

CRICKITT.

Sir JAMES MANSFIELD, C. J. felt considerable doubts how he should dispose of the cause, and desired that it might be brought before the Court. In the mean time, he directed that if the jury believed that *Keene* had authority from the defendant to order the dinner, they should find a verdict for the amount of the bill; and if he had not, then they should only award the plaintiff a compensation for the loss of his share of the dinner which the defendant ought to have given on losing the wager.

The jury found for the plaintiff with 18*l.* damages.

In the ensuing term *Vaughan* Serjeant, obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered. In Easter term following, cause was shewn, and the question was argued on the the same grounds which had been taken at nisi prius. In addition to the former decisions, *Best*, Serjeant, cited *Earl of March v. Pigot*, 5 Burr. 2802, where two heirs apparent ran the lives of their respective fathers against each other, and no objection was made to the subject of the wager: But HEATH J., said, that was a case not to be cited, being of very doubtful authority.

Sir JAMES MANSFIELD, C. J.—I am inclined to think I ought not to have tried this cause. I do not judicially know the meaning of *a rump and dozen*. While we were occupied with these idle disputes, parties having large debts due to them and questions of great magnitude to try, were grievously delayed. However, the cause being here, we must now dispose of it. There
seems

seems great uncertainty as to what is meant by *a rump and dozen*, and it struck me that *Keene* ought to have paid the dinner, and brought his action against the defendant. Upon consideration, however, perhaps the plaintiff might repay *Hurd*, and bring the action by reason of his joint liability to the landlord.

1817.
HUSSEY
&
CRICKITT.

HEATH, J.—I am rather sorry this action has been brought, but I entertain no doubt that it is maintainable. Wagers are generally legal, and there is nothing to take this wager out of the common rule. We know very well privately that *a rump and dozen* is what the witness stated, viz. a good dinner and wine, in which I can discover no illegality. Then it appears clear that the defendant is liable for the amount of the bill. *Keene* having authority from him to order the dinner, it was a joint contract with the landlord; and the plaintiff having paid the whole, he has a right to be reimbursed by the defendant.

CHAMBRE, J. Perhaps it would have been better if courts of justice had refused altogether to entertain actions upon bets; but I see nothing to distinguish this bet from others on which actions have been held to be maintainable. It is neither uncertain nor illegal. The witnesses have explained *a rump and dozen* to mean a good dinner, and this is sufficiently certain. Suppose an order were given to a tavern-keeper to provide *a good dinner*, would he have any difficulty in recovering for it whether it was eaten or not?—Then where is the immorality? Is it impossible for people to sit down to a good dinner without being guilty of excess? I like-

1811.
HUSSEY
v.
CRICKITT.

likewise think that as the parties were jointly liable, this is not a voluntary payment on the part of the plaintiff, and that he is entitled to recover the amount of the bill as money paid to the defendant's use.

Rule discharged.

Best, Serjeant, and *Campbell* for the plaintiff.

Vaughan, Serjeant, and *Scarlett* for the defendant.

[Attornies, *Blunford & Murray* and *Stott*.]

Vide Squires v. Whisken, ante 140.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings in and after Hilary Term,

52 GEORGE III.

FIRST SITTINGS IN TERM AT GUILDHALL.

BOOTHBEY and Others v. SOWDEN.

1812.

Saturday,
Feb. 1.

THIS was an action against the defendant as acceptor of a bill of exchange for 297*l.* 19*s.*, dated 21 Aug. 1810, drawn by the plaintiffs, payable to their own order at 4 months after date. The plaintiffs sought likewise to recover a balance of about 30*l.*, under counts for goods sold, and money paid. *Plea, the general issue.*

The plaintiffs' case being proved, the defence set up was, that in February last the defendant being embarrassed in his circumstances, he was obliged to ask time of his creditors, and that the plaintiffs along with all the rest accordingly signed an agreement, of which the following is a copy :

A man being embarrassed in his circumstances, all his creditors sign an agreement to give him time for the payment of their respective demands by instalments, and to take his promissory notes for the amount. —

This agreement is binding upon each of them, the signing of the others being a sufficient consideration, and they cannot sue for their original cause of action, without proving that the agree-

ment has been broken on the part of the debtor.

“ We

1812.
 BOOTHBEY
 and Others
 v.
 SOWDEN.

“ We the undersigned creditors of Robert Sowden
 “ of Exeter, do hereby agree to grant him, 3, 6, 9
 “ and 12 months on the amount of our respective
 “ demands, and to take his notes payable in London
 “ for the said amount, provided the rest of the cre-
 “ ditors will do the same.
 “ 14 Feb. 1811.”

Garrow for the plaintiffs contended, that this agree-
 ment was void for want of consideration, and that at
 any rate the giving of the notes was a condition pre-
 cedent, which the defendant was obliged to shew he
 had performed.

LORD ELLENBOROUGH.—There was a sufficient con-
 sideration for each of the creditors entering into this
 agreement, that it was subscribed by all the others.
 If the plaintiffs could shew that the defendant had
 refused to give them the notes according to the terms
 of the agreement, they might be remitted to their
 original remedy. But I think that remedy is sus-
 pended by the agreement, unless an infraction of the
 agreement on the part of the defendant, is proved by
 the plaintiffs.

Non suit.

Garrow and *Lawes* for the plaintiff.

Park for the defendant.

[Attornies, *Howard* and *Porter*.]

Vide Steinman v. Magnus, 11 East, 390. 2 Campb. 134. S. C.
Bradley v. Gregory, 2 Campb. 383.

SECOND

 SECOND SITTINGS IN TERM AT WESTMINSTER.

FENN, on the several demises of *PEWTRISS* and
THOMPSON, v. GRANGER.

1812.

Monday,
 Feb. 3.

EJECTMENT for a messuage situate in the parish
 of *St. Giles in the Fields*.

In ejectment on the several demises of two persons, although the evidence shews the title to be exclusively in one of them, the other cannot be compelled to be examined as a witness for the defendant.

A title having been made out in the lessor *Pewtriss* by conveyances from a person seized in fee,—

The defendant proposed to call as a witness the other lessor, *Thompson*, in whom no title appeared, to prove that by the direction of *Pewtriss* he had distrained upon the defendant for the rent of the premises in question, and that *Pewtriss* having thereby acknowledged a tenancy, had precluded himself from bringing an ejectment without a notice to quit.

An objection was taken, that a person who appeared on the record as a lessor of the plaintiff, could not be compelled to give evidence.

On the other side it was insisted, that this rule applied only to those who were parties on the record as plaintiffs or defendants; but the lessor of the plaintiff in ejectment must be considered a stranger, as much as the lessor in an action of covenant by the assignee of the reversion. There was the less reason for the objection to the competency of *Thompson*, as no title

1812.

FENN
and Others

v.

GRANGER.

had been proved in him; and if he could not be examined, it would become a common practice in ejectment, where it was apprehended that the evidence of any particular person would be unfavourable to the action, to disqualify him by inserting in the declaration a demise in his name.

LORD ELLENBOROUGH.—When it is made out that a demise is inserted with such a view, the Court will know how to deal with it. Without any proof of that sort, I must consider all the lessors in ejectment as substantially the plaintiffs on the record. All are jointly liable for costs; that one upon whose title the recovery proceeds is generally the trustee of the other; and there are the same reasons for protecting them from being examined which have produced the general rule of law, that the parties on the record cannot be compelled to give evidence against themselves, and are not permitted to swear in their own favour.

The objection, however, was waived, and Mr. *Thompson* being examined stated, that the distress had been made by mistake and without any authority from *Pewtrifs*. So the verdict passed against the defendant.

Park and *Marryat* for the lessors of the plaintiff.

Garrow and *Comyn* for the defendant.

[Attornies, *Palmer* and *Watson*.]

Vide Norden v. Williamson, 1 Taunt. 378. *Rex v. Hardwick*, 1 East, 578.

FIRST

 FIRST SITTINGS AFTER TERM AT GUILDHALL.

ANDERSON *v.* HICK and Others.

1812.

 Friday,
Feb 14.

THIS was an action against the defendants as acceptors of a bill of exchange drawn upon them by A. & J. Deykin payable to the plaintiff.

The defendants denied that they had accepted the bill.

A witness swore that the bill having been left for acceptance at the defendants' counting-house, was returned unaccepted, as Mr. *Keates* one of the defendants who superintended the account between them and the drawers had been absent; that soon after, the plaintiff met *Keates* in the street, and expressed some surprize that the bill had not been accepted; and that *Keates* then said, "if you will send it to the counting-house again, I will give directions for its being accepted." The plaintiff could not prove that the bill was again sent to the defendants' counting-house.

Where the drawee of a bill of exchange who had once refused to accept it, said to the holder, "if you will send it to the counting house again, I will give directions for its being accepted," — *Held* that he was not liable as acceptor, without evidence that the bill was again sent back to his counting house for acceptance.

Park for the plaintiff contended that *Keates's* words importing a promise to accept, were in law of themselves an acceptance.

LORD ELLENBOROUGH.—This was only a conditional promise to accept, and could not operate as an
 N 2 accept-

1812. acceptance till the bill was sent back to the counting-house.

ANDERSON

v.
HICK
and Others.

Plaintiff nonsuited.

Park and Gurney for the plaintiff.

Garrow and Campbell for the defendant.

[Attornies, *James and Nind*.]

Vide Johnson v. Collins, 1 East, 98. *Clarke v. Cock*, 4 East, 57.
Wynne v. Raikes 5 East, 514.

Saturday,
Feb. 15.

SHEPHERD v. HALL.

An indenture of apprenticeship is not void by 3 Ann. c. 9. although it was originally agreed between the master and apprentice's father, that a premium of 20*l.* should be paid, and the master afterwards, to reduce the amount of the duty, agrees to take 19*l.* 19*s.* 6*d.* which is the sum inserted in the indenture, and actually paid.

MONEY had and received, to recover back the sum of 19*l.* 19*s.* 6*d.* on the ground that it had been paid upon a consideration which had failed.

The plaintiff being about to put his son to the defendant as an apprentice in the business of a *pawn-broker*, it was agreed between the parties that a premium of 20*l.* should be paid. The defendant, however, afterwards said, it would make no difference if he received only 19*l.* 19*s.* 6*d.*, and that he should thus escape the payment of a certain share of the duty. The latter sum was accordingly inserted in the indentures and paid.

Stat.

Stat. 8 Ann. c. 9. § 32. enacts that the duty shall be paid upon the sum "which shall be given, paid, contracted or agreed for, with or in relation to every clerk, apprentice, or servant." It was therefore insisted that 20*l.* was the sum agreed for here, and that since the duty had not been paid upon that, the indentures were void, and the money might be recovered back as upon a failure of consideration.

1812.
SHERIFF
v.
HALL.

LORD ELLENBOROUGH.—The sum agreed upon must mean the sum finally agreed upon, which in this instance was 19*l.* 19*s.* 6*d.*, and the duty being paid upon that sum, the indenture is valid, and the plaintiff has a full consideration for the premium.—It would have been necessary for him, besides, to have proved that he was imposed on by the defendant, and not *in pari delicto*.

Plaintiff nonsuited.

Garrow and Comyn for the plaintiff.

Park for the defendant.

[Attornies *Gregg* and *Mills*.]

POWELL, Assignee of the SHERIFF of MIDDLESEX, v. Monday,
DUFF. Feb. 17.

THE plaintiff declared in the common form upon a bail bond in the penal sum of 194*l.* conditioned

N 3

for

If a party executes a bail bond before the condition is filled up, it is void.

1812. for the appearance of one J. S. at the return of a writ
 of special capias.

POWELL

v.
 DUFF.

Plea, *non est factum*.

The attesting witness swore that when the bond was to be executed, the defendant was in a great hurry to get away; that for this reason he executed it when only the penal part had been filled up, and that the condition was filled up after he had left the office.

Park contended, that for this reason the bond was void.

Garrow, contra, insisted that this like all other contracts must be governed by the meaning of the contracting parties; that the defendant clearly authorized the filling up of the condition in its present shape; that the obligatory part of the instrument was enough to render it a binding deed; and that the case might be likened to a man signing his name on a blank stamp, by which he might be made liable as acceptor of a bill of exchange.

LORD ELLENBOROUGH.—A man may render himself liable as a party to a bill of exchange or promissory note, by signing his name on a blank stamp; but there are certain solemnities indispensable to the validity of deeds. The defendant never did execute a bond with such a condition. The condition is set out in the declaration as part of the instrument, and must have been so; or the plaintiff could not sue as assignee.

The plea of *non est factum* must therefore be found for the defendant.

1812.

POWELL

v.

DUFF.

The plaintiff submitted to be nonsuited.

Garrow and *Espinasse* for the plaintiff.

Jervis for the defendant.

[Attornies *Blifield* and *Duff*.]

“ If a blank be signed, and sealed, and afterwards written ; it is no deed.” *Perk.* § 118. *Com. Dig.* “*Fuit.*” A. 1.

COLES and Another, Assignees of WRIGHT, a Bankrupt, v. ROBINS and Others.

Monday
Feb. 17.

TROVER for household furniture, plate and jewellery.

A trader sends goods to an auctioneer to be sold, and then goes to prison, where he lies above two months. Within this time the auctioneer not knowing of the trader being in prison, sells the goods and accounts with him for the proceeds.

The bankrupt who was a silver-smith and jeweller, being embarrassed in his circumstances, in the end of October 1810 sent the goods mentioned in the declaration to be sold by the defendants, who are auctioneers, at their auction rooms in Covent Garden. A part of them was sold on the 29th of October,

At the end of the two months, a commission of bankrupt is sued out against the trader — Held that his assignees could not maintain trover for the goods against the auctioneer, and that the payment of the money to the trader under these circumstances was protected by 1 Jac. 1. c. 15.

1813. and the remainder in the beginning of November.
 COLES On the 1st of November *Wright* surrendered himself
 and Another to prison in discharge of his bail, and having lain there
 v. two months, a commission of bankrupt was sued out
 ROBINs against him on the 1st of January following. There
 and Others. was no evidence that the defendants ever knew till
 then that he was in prison, or that he was not carrying
 on his business as usual. On the 26th of November
 they settled the balance of his account, and paid the
 sum of 111*l.* 8*s.* 6*d.* to his agent for his use.

It was contended for the plaintiffs, that as the act of bankruptcy clearly referred back to the bankrupt's first surrendering himself to prison, the goods in question must be considered as vested in his assignees from that time. The sale was therefore a tortious conversion of the goods by the defendants.

The defence was rested on stat. 1 Jac. 1, c. 15., which after defining in § 13. the powers of the assignees, provides by § 14. "That no debtor of the bankrupt
 " be hereby endangered for the payment of his or
 " their debt truly and *bonâ fide* to any such bankrupt,
 " before such time as he shall understand or know
 " that he has become a bankrupt." In *Wilkins v. Casey*, 7. T. R. 711. where a factor gave his acceptance to his principal, for the amount of goods sold on account after a secret act of bankruptcy of the principal, but without notice to the factor, and the factor afterwards, even with notice of the bankruptcy, paid his acceptance to the holder of the bill, this was held to be a payment protected by the above statute.

King v. Leith, 2 T. R. 141. must be considered an authority the same way. It was there decided that if a trader become bankrupt by lying in prison two months after an arrest, his assignees may maintain an action for money had and received, against a person *who having notice that a commission would be issued against him*, sells his goods and pays him the produce before the two months are expired. But there the Judges lay all the stress upon the notice, and it clearly appears that if as here, there had been no evidence of such notice, they would have held the payment protected. The situation of auctioneers would otherwise be the hardest in the world, for they have often no means of knowing the situation of a person whose goods they sell; and even if they suspect he has committed an act of bankruptcy, they cannot defend themselves against an action at his suit, till a commission of bankruptcy is actually sued out against him. *Foster v. Allanson*, 2 T. R. 479.

1812.
 COLLES
 and Another
 v.
 ROBINS
 and Others.

For the plaintiffs it was replied that 1 Jac. 1. c. 15. § 14. applies only to continuing dealings with the bankrupt, not to a single transaction taking place after the act of bankruptcy; that auctioneers sell goods sent them under such circumstances at their own peril; and that it was at any rate incumbent on the defendants to prove that they had reason to suppose *Wright* remained carrying on his business in the month of November 1810.

LORD ELLENBOROUGH. — The stat. 1 Jac. 1. c. 15. contains a favourable provision for persons dealing with traders who have committed a secret act of bankruptcy, and

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 COLES
 and Another
 v.
 ROBINS
 and Others.

and ought to receive a liberal construction in respect to *bonâ fide* transactions. These goods were put into the hands of the defendants before the bankrupt went to prison, and when he had a complete controul over them. All the goods were sold before a commission was sued out against him or he had lain two months in prison. Then the statute provides that no debtor of the bankrupt be endangered for the payment of his debt truly and *bonâ fide* before knowing he has become bankrupt. Were the defendants debtors of *Wright*? They certainly were as soon as they had sold his goods and received the produce. Did they pay this debt truly and *bonâ fide*? This is not denied. Did they at the time of such payment understand or know that he was become bankrupt? No evidence has been adduced to shew that they knew he had gone to prison, and they could not prove a negative. If they had known the fact out of which the bankruptcy sprung, this would have deprived them of the benefit of the statute; but it was incumbent on the plaintiffs to prove notice as in *King v. Leith*, and in the absence of such proof, the present appears to be exactly that sort of payment which the statute was intended to protect.

Plaintiffs nonsuited.

Garrow and *Marryat* for the plaintiffs.

Topping and *Best* for the defendants.

[Attornies, *Maylew* and *Stokes*.]

HALL

1812.

Tuesday,
Feb. 18.

HALL v. PICKARD.

THIS was an action on the case; and the declaration stated that before and at the time of the grievance complained of, the plaintiff was owner and proprietor of two horses, which were hired for a certain term to one W. C.; that at the time of the grievance they were in the possession of the said W. C., and drawing his carriage along the public highway; and that while they were in such possession the defendant drove a cart against them, whereby one of them was killed.

If the owner of a horse lets him to hire for a certain time, during which he is killed by the owner of a cart driving it violently against him, the remedy of the owner of the horse against the owner of the cart is *case* and not *trespass*.

It appeared, that when the misfortune happened, the defendant was himself driving the cart with great impetuosity and violence,

Park thereupon objected, that the action ought to have been *trespass*, and not *case*, relying upon *Leame v. Bray*, 3 East, 393, and *Lotan v. Crofts*, 2 Campb. 464.

LORD ELLENBOROUGH.—This is in the nature of an injury to the plaintiff's reversion. He was not in possession of the horses, and according to the authority of *Gordon v. Harper* (a), he neither could have maintained trespass nor trover for them. This is not like a gratuitous permission to use a chattel as in *Lotan v. Crofts*, where the possession constructively remained in the

(a) 7 T. R. 9.

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 {
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 v.
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owner. The horses were let to hire for a certain term to *Dr. Carey*, who had a right to retain them till that was expired, and who was driving them by his own servants when the mischief was done. Case therefore was here the proper and only remedy.—It may likewise be worthy of consideration, whether in those instances where trespasss may be maintained, the party may not waive the trespasss and proceed for the tort.

The plaintiff had a verdict.

Garrow and *Abbott* for the plaintiff.

Park and *Espinasse* for the defendant.

{Attornies, *Fines* and *Moore*.}

Vide *Covell v. Laming*, 1 Campb. 497. *Rogers v. Imbleton*, 2 N. R. 117. *Huggett v. Montgomery*, 2 N. R. 446.

Tuesday,
 Feb. 18.

HOLDEN q. t. v. LAWRIE.

In an action on 5 Eliz. c. 4. for setting on work one who has not served an apprenticeship of 7 years, the defendant is not liable unless he knew that the person set on work had not served an apprenticeship; but the Jury may infer that he knew this from his having had the means of knowledge,

THIS was an action against the defendant on 5 Eliz. c. 4. § 41. for having set on work in the business of a fadler one *Mansel* who had not served therein an apprenticeship of 7 years.

It was clearly proved that the defendant had employed *Mansel* in this business, and that *Mansel* had

previously

previously worked in it for a less period than 7 years, but when the plaintiff's case was closed, there was no evidence whatever, whether the defendant did or did not know of *Mansel's* disqualification.

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HOLDEN
q. t.
v.
LAWREN.

Brougham for the defendant insisted, that he was on this ground entitled to a verdict. The words of the statute are "upon pain that every person *willingly* offending or doing the contrary, shall forfeit and lose for every default 40s. for every month." The forfeiture was thus incurred by offending *willingly*, not unintentionally; and for anything that appeared, the defendant might have had the best reason to suppose that *Mansel* had served an apprenticeship of 7 years to a regular fadler.

LORD ELLENBOROUGH.—Certainly the defendant is not liable to the penalty, unless he knowingly employed a person who had not served an apprenticeship, or neglected the proper means of information upon the subject. He must have offended *willingly*; but that man is a willing offender who sins with knowledge, or who shuts his eyes to exclude it.—His Lordship called back *Mansel* to inquire what passed when he was hired; and upon that left it to the jury to say, whether the offence was wilful or not.

Verdict for the plaintiff for one penalty.

Garrow and *Lawes* for the plaintiff.

Brougham for the defendant.

[Attornies, *Chippendale* and *Felder*.]

1812.

Thursday
Feb. 20.

DOE, d. LULHAM and Others, v. FENN.

In ejectment on the several demises of three persons, each demise being of the whole, the lessors of the plaintiff are entitled to a verdict, upon evidence that they jointly granted a lease to the defendant which has expired.

THIS was an ejectment for certain premises in the parish of *St. Pancras*. The declaration contained

1. A demise for the whole by *Edward Lulham*;
2. The like by *John Gregory*; and 3. The like by *John Crace*; all of which were laid on the 2d of October 1811.

A lease was given in evidence, dated 22d August 1780, whereby the lessors of the plaintiff, *Gregory* and *Crace*, and *John Lulham* now deceased, father of the lessor *Edward Lulham*, demised to the defendant for 30 years (*a*), and it was proved that the defendant had paid rent under this lease.

The *Attorney General* for the defendant contended, that it must be taken that *John Lulham*, *John Gregory*, and *John Crace*, who jointly granted the lease of 1780, were joint tenants, and there being no joint demise by them, the plaintiff could not recover. Each could not be entitled to the whole; therefore there could not be a verdict for the plaintiff generally upon each of the three demises; nor could the plaintiff recover the whole upon any one demise; for the lease of 1780 shewed that

(*a*) There was much discussion whether this instrument was more than an agreement; but

Lord Ellenborough held that it operated as a lease.

there

there were three persons jointly interested in the premises. It was necessary to shew the interest which each of the lessors of the plaintiff had, and then there might be a verdict for so much, upon each of the demises. But there would be the greatest incongruity if there were to be a general verdict for the whole upon each separate demise; and this monstrous injustice to the defendant would ensue, that each of the three lessors might bring an action against him for mesne profits, in which the record in this cause would be conclusive evidence. The old *cantelena* was, that in laying demises in ejectment, "joint tenants must join, tenants in common must sever, and parceners may either sever or join." If this rule was to be relaxed, it was at all events necessary that where a person clearly entitled only to an undivided share of the premises would recover upon a separate demise of the whole, he should shew to what share he was entitled; or the jury had no grounds on which they could safely find a verdict in his favour.

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DOE, d.
LULHAM
and Others,
v.
FENN.

On the other side they relied upon *Roe d. Raper v. Lonsdale*, 12 East, 39.

LORD ELLENBOROUGH.—I am of opinion that the tenant shall not be permitted to set up any such objection. It is proved that he held under the lessors of the plaintiff, and that his term has expired. By the three separate demises, the nominal plaintiff must be considered to have the same interest in him which was formerly conveyed to the defendant by the lease which
has

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**DOE, d.
LULHAM
and Others,
v.
FENN.**

has expired. No incongruity will appear upon the record, for the premises are stated to be different in each demise; and no inconvenience will follow to the defendant, for only one writ of possession can be taken out, and he can only be once removed from the occupation of the premises demised to him which he now wrongfully holds over. If more than one action should be brought against him for mesne profits, or this judgment in ejectment should be in any manner abused, it is always in the power of the court to stay proceedings and to prevent injustice.

Verdict for the plaintiff generally.

Garrow and *Marryat* for the lessors of the plaintiff.

Attorney General and *Gaselee* for the defendant.

[*Attornies, Clarke and Newcomb.*]

Vide Doe d. Marlack v. Read, 12 East, 57.

 ADJOURNED SITTINGS IN LONDON.

BURBRIDGE v. MANNERS.

1812.

 Tuesday,
Feb. 25.

THIS was an action on a promissory note for 101*l.* 15*s.* 5*d.* dated 11th October, 1810, drawn by *J. Finney*, payable 3 months after date at *Frazer & Co.*'s to the defendant, indorsed by him to one *Tinson*, and by *Tinson* to the plaintiff.

Notice of the dishonour of a bill of exchange or promissory note. may be given the same day it becomes due, as soon as the acceptor or maker has refused payment.

The note was regularly presented for payment in the forenoon of the day it became due, when payment was refused; and in the afternoon of the same day, the plaintiff caused notice of its dishonour to be sent to the defendant.

Park for the defendant objected that this was not sufficient notice of the dishonour. *Finney* the maker of the note had the whole of the day it became due to pay it, and till the last minute of that day it could not be considered as dishonoured. The notice therefore stated what was untrue, and was evidently premature.

LORD ELLENBOROUGH.—I think the note was dishonoured as soon as the maker had refused payment on the day when it became due, and the notice sent to the defendant must have answered all the purposes

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for which notice in such cases is required. The holder of a bill or note gives notice of its dishonour in reasonable time the day after it is due; but he may give such notice as soon as it has been dishonoured the day it becomes due, and the other party cannot complain of the extraordinary diligence used to give him information.


Although a bill of exchange cannot be reissued after it has arrived at maturity and been once paid, yet if it is paid and afterwards indorsed before it becomes due, it is a valid security in the hands of a bona fide indorsee.

By the defendant's evidence it appeared that this bill being in the hands of *Maude & Co.* was paid in by them when indorsed only by the defendant to their bankers *Masterman & Co.* who were to present it for payment. *Maude & Co.* had received it from *Finney* the maker, as a collateral security for an acceptance of his, then in their hands over due. On the 10th of January, four days before the note was due, some person unknown came to *Masterman & Co.*'s where it lay, paid it, and carried it away without its being cancelled, or any memorandum being made upon it. However, it had been indorsed by *Tinson*, and had come into the hands of the plaintiff, before it was due.

Park contended that after the bill had been once paid, it could not be reissued, and he relied upon *Beck v. Robley*, 1 H. Bl. 89. n.

LORD ELLENBOROUGH.—Payment means payment in due course, and not by anticipation. Had the bill been due before it came into the plaintiff's hands, he must have taken it with all its infirmities. In that case,

it would have been his business to inquire minutely into its origin and history. But receiving it before it was due, there was nothing to awaken his suspicion. I agree that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills of exchange and promissory notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid; but if they do not, the holders of such securities cannot be affected by any payment made before they are due. While a bill of exchange is running, it remains in a negotiable state. I cannot limit its negotiability the last 4 days before it becomes due more than the first 4 days after it is drawn.

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 v.
 MANNERS.

Verdict for the plaintiff.

Garrow and *Reader* for the plaintiff.

Park and *Best* for the defendant.

[Attornies, *Hannam* and *Stokes*.]

1812.

HONEYWOOD, Bart. SHERIFF of KENT, v. PEACOCK.

In an action by the Sheriff on a bail bond, the bound bailiff who made the caption is a competent witness to prove the execution of the bond, if the defendant knowing his situation asked him to become attesting witness.

DEBT on a bail bond. — Plea *non est factum*.

One *Copland* being called as attesting witness to prove the execution of the bond, it appeared from his examination on the *voire dire*, that he was a bound bailiff to the Sheriff of Kent; that the warrant against the person for whose appearance the bond was conditioned had been delivered to him; and that he made the caption accordingly; but that the defendant knowing all these facts, had requested him to witness the execution of the bond.

Puller for the defendant objected, that *Copland* was not a competent witness, as this in substance was his own action brought in the name of the Sheriff. — But —

LORD ELLENBOROUGH held, that the defendant could not take this objection, after having requested the witness, with full knowledge of the situation in which he stood, to attest the execution of the bond.

There was a verdict for the plaintiff upon *Copland's* evidence.

Marryat for the plaintiff.

Puller for the defendant.

FORSBOOM

1812.

FORSBOOM v. KRÜGER.

Monday,
March 2.

ACTION for wages earned by the plaintiff as a seaman on board the ship *Louise*, of which the defendant was captain.

In the voyage in question the ship failed in ballast from *Hamburg* to *Archangel*, and there took in a cargo, with which she failed, and was wrecked a few days after. The captain and crew returned to *Archangel*. Whilst there, the defendant gave the plaintiff an order on the owner of the ship, who resided at *Hamburg*, in the following form :

“ Mr. J. W. Duncker,

“ Please to pay against this my order, to the order of the mariner C. J. Forsboom or the bearer of this, according to the specified amount delivered to you from me. The value of which he has earned during his engagement with me on board the *Hamburg* bark *Louise*,

“ EMANUEL KRÜGER, *Captain*.”

“ *Archangel*, 14th December 1810.”

To this was subjoined an account containing the following item on the credit side.

“ The above named mariner was hired by me at the wages of 5*l.* 5*s.* per month, was in service until

During a voyage the ship is wrecked, and the Captain gives the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging at the same time that he had hired them by the month. Held that under these circumstances, no action for wages could be maintained by the mariners against the captain, at least without proving that they had hitherto made a demand upon the owners.

1812. 28th October 1810, makes 15 months 3 days,
 FORSBOM amounts to 79*l.* 5*s.* 6*d.*"

v.
 KRUGER.

It was contended for the plaintiff, that this operated as an acknowledgment that wages were due to him at the above rate, for which the defendant as the person who hired him was personally liable.

On the other side it was objected, that under the circumstances there could be no remedy against the captain, at all events till a demand had been made upon the owner. *Primâ facie* no wages were due, for no freight had been earned. The order only admitted that if wages were due, such would be the amount of them. The defendant had by no means acknowledged his personal responsibility. From the loss of the ship, he had no funds out of which he could pay wages, and the defendant by accepting the order had impliedly undertaken to make his demand in the first instance upon the owner.

LORD ELLENBOROUGH was of opinion, that till a demand had been made upon the owner in pursuance of the order, the action could not be maintained, and on this ground directed a nonsuit.

Garrow and *Andrews* for the plaintiff.

Scarlett and *J. Warren* for the defendant.

[Attornies, *Ijuaes* and *Wudefon*.]

Vide Johnson v. Machielsen, ante 44.

ANDREW

1812

ANDREW v. ROBINSON and Others.

Tuesday,
March 3.

MONEY had and received to recover the sum of
200*l*.

The plaintiff, a ship-owner at Hull, had employed the defendants, insurance-brokers in London, to effect a policy for him from Halifax to England. This was subscribed by one *Hodgson* for 200*l*. The ship was lost in the course of the voyage, and the underwriters agreed to pay a total loss. The policy remained in the hands of the defendants, with whom *Hodgson* adjusted the loss. His name was then erased from the policy. He did not actually pay any money to the defendants; but the amount of his subscription was allowed between them in account.

As soon as an insurance broker has received credit in account with an underwriter for a loss upon a policy, his principal may maintain money had and received against him to recover the amount; and in such action if the underwriter's name is erased from the policy, the defendant can neither dispute the liability of the underwriter for the loss, nor his own receipt of the sum subscribed.

Park for the defendants insisted, that the action could not be maintained, without shewing that money had actually been received by them from *Hodgson*, and that at any rate, they were at liberty to prove that no loss had happened for which the underwriters were liable.

Lord ELLENBOROUGH however held, that as the defendants had deprived the plaintiff of all remedy against the underwriter, and had received credit in account for the 200*l*., they were estopped from saying that

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ANDREW

v.

ROBINSON
and Others.

that they had not this sum in their hands for the plaintiff's use, — and the plaintiff had a verdict.

Garrow and Marryat for the plaintiff.

Park for the defendants.

[Attornies, *Sherwood and Kearsey*.]

Saturday,
March 7.

MOXON v. ATKINS.

Policy on goods
“at and from the
ship's loading
port or ports in
Amelia Island
to London.” —
The ship never
touched at *Amelia Island*, but
took in her
cargo at *Tigre Island*, which
lies a little farther up the *River St. Mary's*. — Held that the
policy never-
theless attached,
this being the
usual mode in
which ships in
that trade take
in their cargoes.

THIS was an action on a policy of insurance on goods on board the *Sheddens*, “at and from the ship's loading port or ports in *Amelia Island* to London.”

Amelia Island lies near the mouth of the river *St. Mary's*, which divides Spanish America from the territories of the United States. There is no port of any sort in the Island. A little farther up the river, is *Tigre Island*, which is quite uninhabited. Here ships generally lie to take on board the produce of the interior country brought down the river, although in some instances they make fast to *Amelia Island* by an anchor put on shore, and load there. Having taken in their cargoes at *Tigre Island*, they drop down to *Amelia Island*, abreast of the town of *Amelia*, the residence of the Spanish Governor, where they pay duties and obtain their clearances.

The

The *Sheddens* on the voyage in question, without touching at Amelia Island, took in her cargo at Tigre Island. This consisted of lumber brought down the river. She then set sail, paid the duties and obtained her clearance at Amelia Island in the manner above described, and was lost by the perils of the sea on the voyage home.

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MOXON

v.

ATKINS.

The *Attorney General* for the defendant contended, that under these circumstances the policy had never attached. The ship had never been at any loading port or ports in Amelia Island, and had taken in no goods there. Amelia Island and Tigre Island were as distinct as Great Britain and Ireland. What the secret understanding of the parties might be, was immaterial. The contract between them must be gathered from the language of the policy, and that made the risk to commence upon a contingency which had never happened.

LORD ELLENBOROUGH. — The words of the policy cannot be literally understood, for there is no port in Amelia Island where the ship could load. The real question is, whether there has been a loading at Amelia Island within the meaning of the parties when the policy was effected. Strictly and locally, there has been no loading at Amelia Island. But it is possible that in mercantile contracts, Amelia Island may denominate a region in which Tigre Island is comprehended. Essequibo has been held for some purposes to be part of Demarara, although the two settlements are quite distinct. There is the more familiar instance
of

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v.

ATRINS.

of *Westminster* being considered in *London*, the general name for the metropolis; yet we know that in strictness *London* only comprehends the limits of the *City*. The circumstance of the ship paying duties and clearing at *Amelia Island* may go a great way to shew that ships which do so are conceived to have loaded there. The question here will be, whether upon the evidence this cargo can be said to have been loaded at *Amelia Island* according to the usage of such voyages. If it was, the policy attached, although literally speaking no part of the cargo had ever been upon *Amelia Island*.

The plaintiff had a verdict.

Topping and Richardson for the plaintiff.

The *Attorney General* for the defendant.

• *Vide Vallance v. Dewar*, 1 Campb. 503. *Uhde v. Waters*, *ante*, 16.

Saturday,
March 7.

HYDE v. WILLIS.

Where the charterer of a ship to Jamaica and back, covenanted to load her there with a complete cargo of sugar, and to pay freight for the same at the rate of

ACTION on a charter-party, for a voyage to *Jamaica* and back; whereby the defendant covenanted to load on board the ship at *Jamaica* a full cargo of sugar, and to pay freight for the same at the rate of 10s. 6d. per cwt.

10s. 6d. per cwt. and his agent at *Jamaica* tendered a complete cargo to the captain, but insisted on his signing bills of lading for it at 10s. per cwt, which the captain refused to do; — *Held* that the charterer was liable for dead freight.

The

The defendant's agent tendered the captain a cargo of sugar ; but insisted upon his signing bills of lading for it, at the rate of 10s. per cwt. The captain refused to take it on board on these terms ; and the question was, whether the defendant was liable for dead freight.

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HYDE.
v.
WILLIS.

The *Attorney General* for the defendant insisted, that the captain was bound to take the cargo on board on the terms proposed ; and no prejudice could have arisen from this to the plaintiff, as he might still have sued on the charter-party for freight at 10s. 6d. per cwt.

LORD ELLENBOROUGH. — Had the captain signed bills of lading at 10s. per cwt, he would have been bound to have delivered the goods on being paid at that rate ; but the plaintiff was entitled to have a lien on the cargo for the full amount of the freight, as well as the security of the charter-party. I therefore think the defendant's agent had no right to annex any such condition to the offer of a cargo as that the captain should sign bills of lading at a lower rate than that mentioned in the charter-party, and that the covenant to load a complete cargo has been broken in the same manner as if none had been offered.

Verdict for the plaintiff.

Garrow, Topping and Taddy for the plaintiff.

The *Attorney General* and *Park* for the defendant.

1812.

Saturday,
March 7.

OOM v. TAYLOR.

Where goods insured were warranted free from seizure in the port of discharge, the captain having arrived within about two miles and a half from the harbour of the place to which he was destined, cast anchor and made a signal for a pilot: a pilot boat in consequence come out with douanniers on board, who carried him into the harbour, where the cargo was seized and condemned. Held that this was a seizure in her port of discharge within the meaning of the warranty.

POLICY of insurance on goods by the *Vrow Hendrika*, from London to any port or ports in the Baltic or Gulph of Finland, warranted free of capture and seizure in the port of discharge.

The ship was destined for *Rugenwald*. Having arrived within about two miles and a half from the harbour of this place, she cast anchor and made a signal for a pilot. A pilot-boat in consequence came off, but had douanniers on board, who carried the ship into the harbour, where the cargo was seized and condemned.

Lord ELLENBOROUGH was of opinion that this was a seizure in the port of discharge within the meaning of the warranty.

The plaintiff had a verdict for a return of premium, on account of the ship having failed with convoy.

The *Attorney General*, *Garrow* and *J. Warren* for the plaintiff.

Park and *Topping* for the defendant.

[*Attornies, Gregson and Dennett.*]

MAYDHEW v. SCOTT.

Tuesday,
Nov. 5. 1811.

THIS was an action on a policy of insurance on goods on board the *Industry* "at and from London to the ship's port of discharge in the Baltic, warranted free from capture and seizure in her port of discharge."

If goods insured are warranted free from capture and seizure in the port of discharge, and the goods being destined to *Pillau* are seized while the ship is lying at anchor in *Pillau Roads*, this is a seizure in the port of discharge within the meaning of the warranty.

The goods were consigned to a house at *Pillau*. The ship arrived in *Pillau Roads* on the 10th of December, 1810, and cast anchor about a German mile from the bar at the mouth of the river which leads up to the harbour. The captain went ashore on the 11th and returned on the 13th, finding he could not land the cargo at *Pillau*. He was then ordered to *Liebau*, but was detained in *Pillau Roads* till the 21st, when the ship and cargo were seized by the Prussian government. The witnesses stated that although what is called *Pillau Harbour* be two English miles within the bar, ships often unload a part of their cargoes in the *Roads* at the distance of two or three English miles from the shore before they are able to cross the bar or to get into the harbour.

LORD ELLENBOROUGH was clearly of opinion under these circumstances, that the ship was in her port of discharge within the meaning of the policy when lying in *Pillau Roads*, and that her seizure there was exactly the sort of loss against which the underwriters intended to guard themselves.

The plaintiff was nonsuited.

Garrow

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MAYDHEW

v.

SCOTT.

Garrow and Copley for the plaintiff.*Park and Scarlett* for the defendant.[Attornies, *Willett* and *Blunt*.]

This ought to have been inserted among the cases after Michaelmas Term 1811. It was not brought before the court; but in *Dagleish v. Brook*, K. B. E. T. 1812, the Judges all agreed, that where the goods were destined to *Pillau*, a capture after the ship had cast anchor in *Pillau Roads* was to be considered a capture *in the port of discharge*.—*Id.* *Brown v. Tierney*, 1 Taunt. 517. *Baring v. Vaux*, 2 Campb. 54. *Jarman v. Coape*, 13 East, 394. 2 Campb. 613. S. C.

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OXFORD CIRCUIT.

LENT ASSIZES, 52 GEORGE III.

MONMOUTH.

CROWN SIDE. CORAM WOOD, B.

REX v. WILLIAM EDWARDS.

1812.

Saturday,
March 28.

THE prisoner was indicted for maliciously shooting
at one *Lewis Roberts*.

If during the trial of a prisoner for a capital offence, one of the jurymen is taken ill, the jury may be discharged and the prisoner tried by another jury.

When the evidence for the Crown had been nearly gone through, one of the jurymen fell down in a fit, and was carried out of court in a state of insensibility. After waiting some time, a surgeon who had attended him was sworn, and stated to the court that he had been attacked by an epileptic fit; that he was put to bed; that he remained insensible, and that there was no chance of his being able to return to do duty as a jurymen that day.

Wood, B. then said that under these circumstances he was of opinion the jury should be discharged, another

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REX

v.

EDWARDS.

other jury should be sworn and charged with the prisoner, and the trial begin *de novo*.

Clifford for the prisoner, objected to this course of proceeding. He contended that in capital cases, after evidence has been gone through, the jury cannot be discharged, and that if from any circumstance happening during the trial, it becomes impossible for the jury to find a verdict of *guilty*, this is a sort of *Godsend* for the benefit of the prisoner.

WOOD, B. overruled the objection; but said he would reserve the point for the opinion of the Judges, if the prisoner was found guilty.

The eleven jurymen were then discharged from giving any verdict; their names were again called over, and a twelfth was put into the box; the prisoner was desired, if he would, to challenge them as they came to the book to be sworn; they were all sworn without challenge; the officer charged them with the prisoner in the common form; the witnesses for the crown were sworn anew; and, by consent, the evidence they had before given was read from the Judge's notes, and they were asked whether it was true.

The prisoner was convicted.

In Easter Term following, the point was argued in the Exchequer Chamber before eleven of the twelve Judges. *Clifford* insisted for the prisoner, that he was not properly tried by the second jury, when a former

jury had been charged to try him,—relying chiefly upon the authorities collected in the *Kinlocks' Case, Foster*, 16. But the Judges, without hearing the other side, were unanimously of opinion that the conviction was right, and they mentioned a case before Mr. Baro ADAMS on the Western Circuit, and another before Lord LOUGHBOROUGH at York, where under similar circumstances the like course had been pursued.

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 REX
 v.
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Hughes and Taunton for the prosecution.

Clifford for the prisoner.

Vide Rex v. Ann Scalbert, Leach. Cro. Cas. 706. The prisoner was tried for murder in the year 1794 before Mr. JUSTICE LAWRENCE, the only Judge absent from the Exchequer Chamber on the above occasion. During the trial one of the jurymen was seized with a fit, and carried out of court insensible. On evidence that he was unable to return, the learned Judge dis-

charged the Jury, and ordered another to be sworn. The prisoner was convicted and executed *Vide etiam Rex v. John Stevenson, Leach Cro. Cas. 618,* where the prisoner himself falling down in a fit during the trial, the jury was discharged, and upon his recovery he was tried and convicted by another jury.

GLOUCESTER.

 CORAM WOOD, B.

1812.

Wednesday,
April 1.

MALONEY, Esq. v. BARTLEY.

In an action for a libel in the shape of an extrajudicial affidavit sworn before a magistrate, a person who acted as the magistrate's clerk is not bound to answer whether by the defendant's orders he wrote the affidavit and delivered it to the magistrate, as he might thereby criminate himself.

THIS was an action against the defendant, who is the master of a *Subscription House* at Cheltenham, of which the plaintiff was a member, for a libel, charging that the plaintiff had proposed to the defendant that if he would allow false cards prepared by the plaintiff to be introduced into the club, the defendant should have a share of the profits. Plea, *Not Guilty*.

According to the opening of the plaintiff's counsel, the libel had been published by the defendant in the shape of a voluntary affidavit sworn extrajudicially before a magistrate at Cheltenham.—Notice was given to produce the affidavit, but it was not produced. For the purpose of giving secondary evidence of its contents, Mr. *Griffiths*, clerk to Mr. *Pruin*, who is clerk to the Cheltenham division of magistrates, was then called to prove that by the defendant's orders he had written the affidavit and delivered it to the magistrate before whom it was sworn. The witness declined to answer the questions put to him respecting the affidavit, on the ground that they tended to criminate himself.

The

The counsel for the plaintiff insisted that he was bound to answer, as he could not be criminally liable for the contents of the affidavit. He acted merely in the capacity of clerk to the magistrate. He had no malice to the plaintiff, and could have no intention in what he did to scandalize any individual. When a person comes to lay an information before a magistrate, it would be too much to require that the clerk should know in every instance whether the magistrate has jurisdiction, and if not, to punish him as a libeller for drawing or copying an affidavit. The point to be considered must be, whether he acts *bonâ fide*,—whether he means to discharge his duty as a magistrate's clerk, or to traduce the character of another. The mere copying of a libel is no offence, or the officer of the court whose duty it is to set out a libel in an indictment might himself be indicted.—Might not the witness be compelled to answer, whether he had copied the libel in a brief, or delivered a case containing a copy of it for the opinion of counsel? Where is the difference between that and writing a copy to be delivered to a magistrate? Suppose the witness as clerk were to read before a bench of magistrates a libellous affidavit which he had not previously seen, concerning some matter over which it is found they have no jurisdiction, could he be indicted for publishing a libel? Certainly not. The *quo animo* must always be looked to. *Actus non facit reum nisi mens sit rea*. Here the witness cannot criminate himself by merely answering that as clerk to the magistrates he wrote the affidavit by the defendant's orders and delivered it to the magistrate before whom it was sworn. Malice may often be inferred; but in this in-

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1812. Since it is rebutted by the very circumstances under which the witness acted and which are involved in the terms of the questions proposed.

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v.

BARTLEY.

On the other side they relied upon *Rex v. Bear, Salk. 417*, where it is laid down by HOLT, C. J. “ that the bare copying out of a libel by one that is “ neither contriver nor composer, is highly criminal. “ The essence of a libel consists not in the infamous “ matter, for if a man speaks such words, unless the “ words be put in writing, he is not guilty of a libel ; “ but the nature of a libel consists in putting this “ infamous matter in writing. *In all cases where a “ man does that act which makes a thing to be what “ it is; he is, and must be construed to be the doer “ of that thing.* Therefore he held, that writing “ a copy of a libel was writing a libel, and if the law “ were otherwise, men might write copies and print “ them with impunity.”

WOOD, B.—I think the questions proposed, tend to criminate the witness. The affidavit which he is supposed to have copied and delivered to the magistrate is alledged by the plaintiff to be libellous, and it was extrajudicial. Therefore, all concerned in writing and publishing it, are in point of law guilty of a misdemeanor. Had the affidavit been made in the course of a judicial proceeding, no indictment nor action could have been maintained against the clerk, whatever might be the nature of its contents. But the affidavit being voluntary and extrajudicial, I cannot take notice that the person before whom it is pretended

tended to be sworn was a magistrate, or allow any privilege to those who were employed in framing it. The witness is in the common situation of a person who has without authority written a copy of a libel and delivered it to a third person. If his master, or if the magistrate had ordered him to do so, this would be no justification. It has been held, that the mere delivery of a libel to a third person by one conscious of its contents, amounts to a publication and is an indictable offence. I take the question to be, whether the witness was not concerned in writing the affidavit and delivering it to the magistrate; and this I am of opinion he is not bound to answer.

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Plaintiff nonsuited.

The plaintiff's counsel tendered a bill of exceptions to this direction; but I understand the learned Judge has not been called upon to seal it, and that upon consideration it has been dropped.

Jervis, Taunton and Puller for the plaintiff.

Dauncey and Abbott for the defendant.

In *John Lamb's Case*, 9 Co. 596. it is laid down that "if one writes a copy of a libel and does not publish it to others, it is no publication of the libel. But it is great evidence that he published it, when he, knowing it to be a libel, writes a copy of it; unless afterwards he can prove that he delivered it to a magistrate to examine it, for then the act subsequent explains his intention precedent."

An action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely spoken.

The important question concerning written slander referred to in *Earl of Leicester v. Walter*, 2 Campb. 251, has at last been decided in the EXCHEQUER CHAMBER; and it is now settled that an action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely spoken.

The case of *Kaye v. Bailey* which I before mentioned, was allowed to drop, on account of the death of the defendant; but the same question immediately after arose in the case of

Thorley v. Earl of Kerry in Error. This was an action for a libel contained in a letter addressed to *Lord Kerry*, and sent open by one of his servants, who became acquainted with its contents. The libel charged His Lordship with being a hypocrite and using the cloak of religion for unworthy purposes.

The cause was tried at *Kingston Spring Assizes* 1809, when there was a verdict for the plaintiff below, with 20*l.* damages. He had afterwards judgment in K.B. without argument; whereupon a writ of error was brought in the Exchequer Chamber.

In Easter term 1811 the case was argued by *Barnewall* for the plaintiff in error and *Dampier*

for the defendant in error, and in Easter term 1812, judgment was given by SIR JAMES MANSFIELD, Chief Justice of the Common Pleas.

His Lordship observed this was certainly a libel for which the writer might have been indicted; but he had entertained considerable doubts whether it could be the ground of a civil action. As to a civil action, there seemed on principle to be no well founded distinction between written and unwritten slander. The reasons given in the books for such a distinction are very insufficient. One reason is, that by writing the scandal becomes more diffused; but this is casual, for words may be spoken under circumstances which shall give them much more publicity and render them much more injurious than if they were committed to paper and shewn to a third person. Another reason is, that the writing of the scandal shews more malice in the defendant; but the true foundation of a civil action, is some damage sustained by the plaintiff, not the malice which actuates the defendant. It was with great difficulty therefore His Lordship had brought his mind to yield to the authority of the cases upon the

the subject. There were cases Court could not now venture to however establishing this distinction above a century ago, the practice of a century and and dicta to the same effect by the authority of so many great Lord HALE, Lord HARD- names. wick, and other very learned and eminent Judges; and the Judgment affirmed.

The copy of a sentence of condemnation of a ship or cargo in a foreign Admiralty Court is not made admissible evidence for the underwriters, by being handed over to them by the assured along with other papers to satisfy them of the loss.

Flindt v. Atkins, Sittings at Westminster after E. T. 1811. Policy on goods from London to the Baltic. Loss by capture. — Defence, that the ship had been condemned under an order of the government under which the assured lived.

To prove that the ship had

been condemned, the counsel for the defendant offered in evidence a copy of the sentence of condemnation handed over among other papers by the assured to the underwriters.

LORD ELLENBOROUGH. —

This paper is not rendered evidence by being handed over in the manner described. I ruled the same point lately in the case of *Bell v. Carstairs*. If you would prove the sentence, you must produce it under the seal of the Court in the usual way. — The plaintiff had a verdict.

Copy of sentence of condemnation, not evidence, though handed over by assured to underwriters.

If A. into whose possession goods happen to come, being ignorant that B. is the real owner, refuses to deliver them to him till B. proves that he is so, this refusal is no evidence of a conversion to enable B. to maintain trover against A. for the goods.

Green v. Dunn. Westminster Sittings after M. T. 1811. — Trover for timber, which defendant found on his premises, and which had been deposited there by the permission of the servant of the former occupier.

The plaintiff to whom the timber belonged having demanded

Refusal to deliver goods, by person ignorant of real owner no evidence of conversion.

manded it of the defendant, LORD ELLENBOROUGH. —
the latter said: If you will This is a qualified refusal, and
bring any one to prove it is no evidence of conversion.
your property, I will give it
you, and not else.

Plaintiff nonsuited.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Easter Term,

52 GEORGE III.

FIRST SITTINGS AFTER TERM AT GUILDHALL.

RUCKER AND ANOTHER *v.* HILLER.

1811

Wednesday,
May 13.

THIS was an action by the indorsees against the drawer of a foreign bill of exchange for £100. dated at St. Petersburg, 15th July 1810, addressed to *Messrs. Coates, Cafs, & Co.* London, payable at two months after sight, to the order of *Messrs. Schumacker & Co.*

If the drawer of a bill of exchange has reasonable ground to expect that it will be honoured on the strength of a consignment, he is entitled to notice of its dishonour, although no effects ever get into the hands of the drawee to pay it.

The bill was refused acceptance; and the question was, whether the defendant was entitled to notice of its dishonour?—*Mr. Coates*, one of the drawees, being examined, stated that the defendant was sent out to Petersburg to purchase goods, which were to be con-

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and another
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signed to them in London : he accordingly consigned several cargoes to them, and drew bills upon them to a large amount : they accepted and paid bills so drawn for more than the value of all the consignments : the cargo, in respect of which the bill in question was drawn, had been detained in Russia for want of a licence, and was so materially damaged as to be hardly sufficient to pay the freight when it arrived : the defendant had considerably overdrawn his account with *Coates, Capps, & Co.* and from the time this bill was drawn till it became due, they had no effects of his in their hands from which they could have paid any part of it.

Park for the plaintiff contended, that this was a case where no notice was necessary. No case upon this subject had gone farther than *Hammond v. Dufrene (a)*, in which his Lordship held, that if the drawee has any effects in his hands, at any time between the drawing of the bill and its becoming due, the drawer is entitled to notice. But here the drawees never had any effects in their hands out of which the bill could have been satisfied, and the drawer was not entitled to notice, as he could suffer no damage by the want of it.

Lord ELLENBOROUGH.—If there be a reasonable expectation, that a bill of exchange will be honoured upon the strength of a consignment, I am of opinion the drawer is entitled to notice of its dishonour, although it turns out that the drawee never has any

(a) *ante* 145.

effects in his hands to meet the payment of it. This cannot be considered visionary paper, with respect to which the custom of merchants need not be observed. The object of notice is not merely to enable the drawer to withdraw his effects from the hands of the drawee, but to provide for payment of the bill thus suddenly cast upon himself, and to make prompt arrangements suited to this unexpected emergency. Where the drawer has solid reason to believe that the bill will be honoured, he is necessarily damnified, and therefore he is discharged, by the laches of the holder.

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RUCKER
and another
v.
HILLAR,

Plaintiffs nonsuited.

Park and *Taddy* for the plaintiffs. .

Topping and *Reader* for the defendant. .

 [Attornies, *Palmer & Co.* and *Bellamy*.]

Vide *Thackray v. Blackett*, ante 164.

ADJOURNED SITTINGS AT WESTMINSTER.

1812.

Friday, May 15.

BASTOW v. BENNETT.

An undertaking to be answerable to a given amount for any goods supplied by A. to B., after goods to that amount have been supplied and paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. But as soon as A. alters the credit on which he supplied the goods to B., the surety is discharged.

ASSUMPSIT on a guarantie, in the following form, signed by the defendant :

“ London, 7th March 1810.

“ I hereby undertake and engage to be answerable
 “ to the extent of £300. for any tallow or soap supplied by Mr. *Bastow* to *France & Bennett*, provided
 “ they shall neglect to pay in due time.”

The plaintiff immediately after supplied tallow and soap to *France & Bennett* to a large amount, at two months credit. They regularly paid him above £300.; but in the summer of 1810 they owed him a larger sum, and became considerably embarrassed in their circumstances. A meeting of their creditors was then held, at which it was agreed that the creditors should continue to supply them with goods payable in ready money, but that the payments made should be applied to the old debts till they were satisfied. The plaintiff opened a new account with *France & Bennett* on this footing, and they afterwards became bankrupt, being indebted to him for tallow and soap in the sum of £547. 10s. The balance of the first account, however, was nearly satisfied.

Park

Park for the plaintiff contended, on the authority of *Mason v. Pritchard*, 12 *East*, 227. 2 *Campb.* 436. that the defendant was liable to the full amount of £300.

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Gaselee, contra, insisted, that after the sum of £300. had been once paid to the plaintiff by *France & Bennett*, the guarantie was exhausted. In *Mason v. Pritchard* the defendant became answerable for any goods the plaintiff *might supply*, which might well be construed into a continuing guarantie: but the word here is *supplied*, which seems to contemplate a single transaction. At any rate, the defendant could not be liable after a new mode of dealing had been introduced between the parties, and must have credit for the payments subsequently made on the old account.

LORD ELLENBOROUGH.—The defendant here became answerable for *any* soap or tallow supplied by the plaintiff to *France & Bennett*. Without the word *any*, it might perhaps have been confined to one dealing to the amount of £300.; but as it is actually worded, I am of opinion it remained in force while the parties continued to deal on the footing established when it was given. But I think the goods supplied after the new arrangement were not within the scope of the guarantie, and that the defendant is only answerable for the unsatisfied balance of the old account.

Verdict accordingly.

Park and *Lawes* for the plaintiff.

Gaselee for the defendant.

[Attornies, *Webb* and *Anneft.*y.]

Vide Merle v. Wells, 2 *Campb.* 437.

1812.

Thursday,
May 21.

REX v. INHABITANTS OF ST. GEORGE, HANOVER SQUARE.

Where the bur-
then of repairing
a highway is
transferred by a
public act of
parliament from
the parish to
other persons, if
the parish be in-
dicted for not re-
pairing this high-
way, there is no
occasion for a
special plea,
stating who are
bound to repair
it, but the ex-
emption may be
taken advan-
tage of under the
general issue,
of *Not Guilty*.
Although a sta-
tute enacts, that
the paving of a
particular street
shall be under
the care of
commissioners,
and provides a
fund to be applied
to that purpose,
and another
statute passed for
paving the streets
of the parish,
contains a clause
that it shall not
extend to the
particular street,
the inhabitants
of the parish are
not exempted
from their com-
mon law liability
to keep that
street in repair.

THIS was an indictment for not repairing the pave-
ment of *Piccadilly*, from *Hyde Park Corner* to
Bond Street. Plea, *Not Guilty*.

Evidence was given, that the street in question is in
the parish of *St. George, Hanover Square*, and that the
whole of it was out of repair at the time mentioned in
the indictment.

The Counsel for the defendants undertook to prove,
that so much of *Piccadilly* as lies between *Bond Street*
and *Clarges Street* was, during that time, in good
repair, and that the parish was not answerable for the
residue. Stat. 6 Geo. 3. c. 54. which appoints com-
missioners for paving and lighting the City and Liberty
of *Westminster*, enacts, "That the roads leading from
" the end of *Clarges Street* to the turnpike gate near
" *Hyde Park Corner*, shall be under the care, manage-
" ment, and direction of the said commissioners, and
" that to enable them to pave and keep in repair the
" said roads, the trustees for repairing the roads in
" the parishes of *Kensington, Chelsea, and Fulham*,
" shall pay yearly to the said commissioners the sum of
" £1000. which shall be applied by them in paving,
" cleansing, and repairing the said roads, leading
" from the end of *Clarges Street* to the turnpike-gate
" near *Hyde Park Corner*." And stat. 29 Geo. 3. c. 75.
for

for paving, cleansing, and lighting the streets and squares, &c. in the parish of *St. George Hanover Square*, contains a provision, that none of the powers contained in that act shall extend to such part of *Piccadilly* as lies between *Clarges Street* and *Hyde Park Corner*. Both these are declared to be public acts.—The effect of them, the Counsel for the defendants argued, was, entirely to exempt the parish from the repair of that part of *Piccadilly* lying between *Clarges Street* and *Hyde Park Corner*, the repairing of it being placed under the care of the commissioners of pavement, a fund being provided for the purpose, and the legislature having expressly declared, that the act for repairing the other streets in the parish should not extend to this part of the street in question. The parish had no fund to repair it, and would be trespassing if they were to interfere with it.

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 {
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 ST. GEORGE
 HANOVER
 SQUARE.

On the other side, they denied the exemption, and contended, that at any rate, this was no defence under the general issue.

LORD ELLENBOROUGH.—If these acts of parliament did exempt the parish from the repair of the highway in question, I think this would be a sufficient defence upon the plea of *Not Guilty*. In general, when a parish denies its liability to repair a highway, a special plea is necessary, stating who are liable; but I do not think this rule applies when the burthen of repairing is transferred from the inhabitants of the parish by a public act of parliament; to which all are supposed to be privy, and of which all are supposed to have cognizance.—I am of opinion, however, that these acts are

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 v.
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 ST. GEORGE
 HANOVER
 SQUARE.

no answer to this indictment. They certainly do not expressly exempt the parish from the common law liability to repair all highways within its limits. Do they create any exemption by implication? I think not. The duty of repairing may be imposed upon others, although the parish be still liable. The parish must, in the first instance, see that the street is properly paved, and seek a remedy over against the Commissioners. The thousand a year is an auxiliary fund; but will not prevent other means being resorted to, which would have been available had the acts relied upon never passed.

Guilty.

Jekyll, Alley, and Walford, for the prosecution.

Garrow, Marryat, Gurney, and Danman, for the defendants.

[Attornies, *Field and Dawson*.]

Vide Rex v. Sheffield, 2 T. R. 106. Rex v. Mayor of Liverpool, 3 East, 86. Rex v. Bridekirk, 11 East, 304.

Friday, May 22.

REX v. CROSS.

It is an indictable offence for stage coaches to stand plying for passengers in the public streets.

THIS was an indictment for causing and permitting divers coaches to stand and remain for a long and unreasonable time in the public highway near *Charing Cross*, to the great annoyance of His Majesty's subjects.

The

The defendant is proprietor of a *Greenwich* stage-coach, which comes to *London* twice a day, and draws up at the place in question, nearly opposite Messrs. *Drummond's* banking-house. There it remains for about three quarters of an hour, taking in parcels and waiting for passengers. On *Sundays*, and occasionally at other times, the defendant employs extra coaches, which ply there in the same manner. A great number of other stage-coaches from *Greenwich* and the adjoining villages come to the same spot. There are generally six or seven in a row close to the curb stone; often two tiers, and sometimes three. A number of persons are employed to solicit passengers to go by these coaches. Private carriages can very rarely draw up to the opposite houses, and considerable difficulty is experienced in passing along that side of the street.

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 {
 REX
 v.
 CROSS.

It appeared that for a great number of years *Greenwich* stages have stopped and plied at this place, but that their number has of late been greatly increased.

Garrow for the prosecution contended, that the defendant was clearly guilty of a public nuisance, in keeping his coaches standing in the public street such an unreasonable length of time; and he relied upon *Rex v. Russell*, 6 East, 427, where it was held that a waggoner occupying one side of a public street in a city, before his warehouses, in loading and unloading his waggons for several hours at a time both day and night, and having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying

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lying on the ground on the same side ready for loading, was indictable for a public nuisance, although there were room for two carriages to pass on the opposite side of the street.

Marryat, contra, insisted, that there was hardly any resemblance between that case and the present. All that had been proved against the defendant was, that twice a day his coach drew up at the side of a very wide street, and remained there for a short time to set down and take up passengers. He could not be answerable for any improprieties of which persons connected with other coaches stopping there might be guilty. The practice of *Greenwich* coaches waiting at this place had prevailed ever since the building of *Westminster Bridge*, and never was complained of till the present indictment was preferred. So in all the great avenues to the metropolis, there is some spot where stage-coaches going to particular villages assemble. A great share of accommodation is thus afforded to the public, which much more than counterbalances any partial inconvenience which the practice may occasion. If the defendant is guilty of a nuisance, there might be an hundred indictments for the same offence, every time a *rout* is given by a fashionable lady at the west end of the town.

LORD ELLENBOROUGH.—And is there any doubt that if coaches on the occasion of a *rout*, wait an unreasonable length of time in a public street, and obstruct the transit of His Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of

of a nuisance? In measuring out the punishment, the Court would examine whether the act was repeated, and what degree of public inconvenience was experienced. But every unauthorized obstruction of a highway to the annoyance of the King's subjects, is an indictable offence. Upon the evidence given, I think the defendant ought clearly to be found guilty. The king's highway is not to be used as a stable-yard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. The stell fishery across the river at *Carlisle* had been established for a vast number of years; but Mr. Justice BULLER held that it continued unlawful, and gave judgment that it should be abated. A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time; and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another. No one can make a stable-yard of the king's highway.

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 Rex
 v.
 Cross.

Guilty,

Garrow and *Gurney* for the prosecution.

Marryat and *Adolphus* for the defendant.

[Attornies, *Webb* and *Sherman*.]

Vide Rex v. Jones, *post* 230.

1812.

Friday, May 22.

NODIN v. MURRAY.

The duplicate of a writing taken from the autograph at one impression, by means of a copying machine, cannot be read in evidence as an original.

TROVER for a ship.

In the course of the trial it was proposed to give in evidence, as an original letter, a duplicate taken from the autograph, at one impression, by means of a copying machine.—But,

Lord ELLENBOROUGH said, he could only treat this as a copy, though it was likely to be more accurate than one taken by successive imitations, and therefore it could not be read without a notice to produce the original written by the party's own hand.

The Defendant had a verdict.

. Garrow, Jervis, and Lamb, for the Plaintiff.

Scarlett, Puller, and Brougham, for the Defendant.

[Attornies, Rogers and Murray.]

Saturday,
May 23.

JONES v. WOOD ESQ. AND ANOTHER.

In an action against the sheriff for a false return, to connect him with the acts of a particular officer in the execution of the writ, it is not enough to shew that this officer's name is written in the margin of the examined copy of the writ and return. But without producing the warrant, it was held to be enough to give in evidence a paper issued by the sheriff's office and directed to this officer, requiring him to give instructions for making a return to the writ.

THIS was an action against the late sheriff of the county of Middlesex, for falsely returning to a writ of *fieri facias*, that he had taken goods, which

remained

remained in his hands for want of buyers, although he had levied the money upon the goods, and ought to have had it in Court at the return of the writ.

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v.
Wood Esq.
and another.

One *Dowick*, an officer of the sheriff, was called, to prove that he had taken the goods, and that the money to be levied was paid to him to redeem them. The warrant was not produced; but in the examined copy of the writ and return, *Dowick's* name appeared written on the margin. The plaintiff's counsel contended, that by the course of office this meant, that the warrant was directed to *Dowick*, to be executed by him; but Lord ELLENBOROUGH held it to be insufficient to connect the sheriff with his acts.

A paper was then given in evidence, which was produced, on notice, from the sheriff's office. This contained, first, an order to *Dowick* to give the necessary instructions for making a return to the writ in question; and then *Dowick's* answer, in these words, "goods in hand, for want of buyers."—It was contended for the defendants, that nothing but the production of the warrant could render the sheriff answerable for the acts of the officer.

Lord ELLENBOROUGH, however, held that this paper amounted to a clear recognition by the sheriff that *Dowick* was the officer to whom the execution of the writ had been intrusted; and that if the money was paid to *Dowick* before the return of the writ, the sheriff must be considered guilty of having returned falsely that the goods remained in his hands for want of buyers.

The

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v.

WOOD Esq.
and another.

The plaintiff had a verdict for the amount of the sum to be levied.

Gaselee for the plaintiff.

Comyn for the defendant.

[Attornies, *Newcomb and Smith.*]

So, in an action of trespass against the sheriff for a wrongful act of the bailiff, it is not enough to prove that he is a general bailiff, and had given a bond of indemnity to the sheriff as such, and to prove a copy of the war-

rant under which he entered and seized the plaintiff's goods. *Drake v. Sykes*, 7 T. R. 113. *Vide Blatch v. Archer*, Cowp. 63. and *M'Neil v. Perchard*, 1 Esp. N. P. C. 263.

Saturday,
May 23.

REX v. JONES.

It is an indictable offence for a timber merchant to cut logs of timber in the street adjoining his timber yard; though he should not be able otherwise to get them into his premises, or to carry on his business there.

THIS was an indictment for depositing, hewing, and sawing logs of wood in *St. John Street*.

It appeared that the defendant occupies a small timber-yard close by the spot in question, and that from the narrowness of the street, and the construction of his own premises, he had in several instances necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there, before they could be carried into his yard.

Marryat, as his counsel, contended, that he had a right to do so, as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogheads

hogheads of beer from their drays and letting them down into the cellar of a publican.

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v.

JONES.

LORD ELLENBOROUGH. If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house;—the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business.

Guilty.

Garrow, the *Common Serjeant*, and *Richardson*, for the prosecution.

Marryat for the defendant.

[Attornies, *Reynolds* and *Williams*.]

Vide Rex v. Cross, ante 224.

 ADJOURNED SITTINGS IN LONDON.

1812.

Tuesday,
May 26.

M'CRAW v. GENTRY.

A person who
sees an instru-
ment executed,
but is not de-
sired by the
parties to attest
it, cannot, by
afterwards put-
ting his name to
it, prove it as an
attesting witness.

ACTION against the maker of a promissory note,
which purported to be attested by two wit-
nesses.

One of these being called to prove it, stated that he did not put his name to it in the presence of the defendant, nor was he ever called upon by the defendant to attest it; but he saw the defendant deliver it as his note of hand to the payee, and he afterwards put his name to it without the defendant's knowledge.

LORD ELLENBOROUGH.—I cannot receive the evidence of this person as of an attesting witness to the note. He was no attesting witness, but a mere volunteer. If the other person, whose name is on the note as attesting witness, really was so, it can only be proved by his evidence.

It appeared however that this person had put his name to it exactly under the same circumstances as the other, and the defendant's acknowledgment was con-

sidered sufficient to fix him. So the plaintiff had a verdict.

1812.
M'CRAW
v.
GENTRY.

Garrow and Littledale for the Plaintiff.

Jervis for the Defendant.

[Attornies, *Bodfield* and *Johnson*.]

Vide Fitzgerald v. Elſoe, 2 Camp. 635.

HEANNY and another, Assignees of MARCHAND a Bankrupt, v. BIRCH and another, Sheriffs of London.

Tuesday,
May 26.

TROVER for a fishing smack taken in execution after an act of bankruptcy.

The only question was as to the trading with reference to the petitioning creditor's debt, which became due in September 1811.

It was proved, that the bankrupt carried on the business of a fisherman from the port of *Barking* in Essex. Persons in this line, during the turbot season, which lasts about three or four months in the summer, generally sail over to the coast of Holland for the purpose of fishing. One boat very rarely catches a sufficient cargo to be carried to London in so short a time that the fish can be kept in good condition. They are therefore in the habit of buying fish from

If a fisherman buys fish at sea from other boats for the purpose of making up his cargo, which he carries ashore and sells, he is a trader within the meaning of the bankrupt laws; and if such be the usual practice of a particular class of fishermen, one of them who is proved to have once done so, will be presumed to have continued to carry on his business in the same manner.

1812.

HEANNY
and another

v.

BIRCH
and another.

one another at sea, which they resell at Billingsgate. In the winter, the *Barking* fishermen go to the North Sea to catch cod, and usually, though not universally, buy from each other in the same manner. It was proved that during one turbot season some years ago, the bankrupt bought fish on the Dutch coast to fill up his cargo, which he resold in London; but there was no evidence of his having bought fish at any subsequent time. The witnesses stated, however, that he continued to go out to sea as a fisherman till the beginning of the present year, when he became bankrupt.

Marryat for the defendant contended, that the buying a few fish to make up a cargo, was not a substantive trading; but was merely incidental to the business of a fisherman, which clearly does not subject a person to the bankrupt laws. This man sought his living by catching fish from the sea, not by buying and selling them.—At any rate, allowing him to be a trader when he was proved to have bought fish to eke out his cargo on the Dutch coast, he must be taken to have ceased to be so before the petitioning creditor's debt accrued; and in that case, according to the authority of *Meggat v. Mills*, *Lord Raym.* 287. 12 *Mod.* 159. *S. C.* the commission could not be supported.

LORD ELLENBOROUGH.—The buying and selling of fish by a fisherman in the manner described, is certainly sufficient to make him a trader within the meaning of the bankrupt laws; and although this person is only proved to have bought and sold fish one season, I must presume that he still carried on his business in the

the usual way, and continued a trader down to the time of his bankruptcy.

1812

HEANNY
and another
v.
BIRCH
and another.

The plaintiffs had a verdict.

Garrow and Lawes for the Plaintiffs.

Marryat and Walford for the defendants.

[Attornies, *Atkinson and Palmer.*]

GUEST v. CAUMONT.

Wednesday.
May 27.

THE declaration alledged, that the defendant at London, in the parish of St. Mary le Bow, in the ward of Cheap, was indebted to the plaintiff for the use and occupation of certain premises *situate and being at London aforesaid, in the parish and ward aforesaid.*

In an action for use and occupation, although it be unnecessary to state in the declaration in what parish the premises are situate; if this is alledged, a variance in the name of the parish is fatal.

The premises, for the use and occupation of which this action was brought, are situate in *the parish of St. Bride, in the ward of Farringdon Without.*

An objection being taken on account of this variance, the plaintiff's counsel contended that the mention of the parish and ward must merely be considered as *venue*; and at any rate that, as it is now settled by the recent case of *King v. Fraser*, 6 East 348. that there is no occasion to state in the declaration where the premises are situate, the words "in the parish and ward aforesaid" might be struck out as surplusage:—But—

R 2

Lord

1812.

GUEST

v.

CAUMONT.

Lord ELLENBOROUGH said, these words must be considered a local description of the situation of the premises, and could not be rejected, being by no means irrelevant. Therefore, as the premises occupied by the defendant were in a different parish and ward, the variance was fatal, and the plaintiff must be non-suited.

Garrow and Lawes for the plaintiff.

Marryat for the defendant.

[Attornies, *Willoughby* and *Mitchell*.]

Wednesday,
May 27.

SCOTT v. CLARE.

To prove that the plaintiff was discharged under an insolvent act after the cause of action accrued and before action brought, it is not enough to give in evidence a parol acknowledgment by him; but the clerk of the peace should be called, and the order of sessions produced to shew the regularity of the discharge.

GOODS fold.—Plea, the general issue.

One defence set up was, that the plaintiff had been discharged under an insolvent debtor's act after the cause of action had accrued, and before the action was brought.—To prove the discharge, the defendant's counsel proposed to give in evidence a verbal acknowledgment by the plaintiff himself, upon the question being put to him.—But—

Lord ELLENBOROUGH said this was insufficient, as the discharge might be irregular and void, and the plaintiff might be mistaken; and that to prove a judicial act of this sort it was necessary to call the clerk of the peace, and give in evidence the order of the court

court of quarter sessions, by which the discharge was effected.

The plaintiff had a verdict.

Garrow and *Lawes* for the plaintiff.

Scarlett for the defendant.

[Attornies, *Stevenson* and *Reilly*.]

1812.
GUEST
v.
CAUMONT.

OVINGTON v. BELL AND ANOTHER.

Wednesday,
May 27.

THIS was an action for money had and received, to recover the sum of £20. 2s. 3d.

Insurance brokers holding a policy for the purpose of adjusting a loss, suffered an underwriter's name to be struck out, upon his signing the adjustment;—he gave them credit in his books for the loss, and became bankrupt; but they never took credit for the amount in their books;—on the contrary they gave the assured notice of the bankruptcy, and there was afterwards a settlement of accounts between the brokers and the assured comprehending the policy in question.

The plaintiff, in March 1810, had employed the defendants as insurance brokers, to effect a policy for him from London to Malta. This was subscribed by one *Oswin* for £200. A partial loss happened, and an adjustment at £10. 2s. 3d. per cent. was signed by *Oswin's* agent in the beginning of July, when his name was erased from the policy, and credit given in his books to the defendants for the amount of the loss. *Oswin* about this time became bankrupt, but whether the adjustment was before or after his bankruptcy, did not distinctly appear. The defendants were privy to *Oswin's* name being erased from the policy, but they never took credit in their own books for the amount of the loss; and on the 26th of July they gave

in which no demand was made upon them in respect of the bankrupt's subscription.—Ruled, that they were not liable to the assured for the sum due from the bankrupt on the policy.

1812.
 OVRINGTON
 v.
 BELL
 and another.

notice to the plaintiff that *Oswin* was bankrupt, and that he must prove the loss under his commission. In January 1811 there was a settlement of accounts between the parties, when the defendants paid the plaintiff £184. 9s. without any claim being made in respect of *Oswin's* subscription.

Garrow, for the plaintiff, insisted, upon the authority of *Andrew v. Robinson*, ante 199, that the defendants were stopped from disputing that they had received the £20. 2s. 3d. from *Oswin* to the plaintiff's use. By permitting the underwriter's name to be erased, they had deprived the plaintiff of his remedy on the policy; and when they had credit in account with the underwriter, it was the same as if the amount had been paid to them in cash.

LORD ELLENBOROUGH.—I do not retract what I held in *Andrew v. Robinson*; but the rule there laid down can only apply where the circumstances are the same. Here it is proved that the insurance broker never took credit in his account with the underwriter for the amount of the loss; and it does not certainly appear even that the adjustment took place before the bankruptcy. But what makes an end of this case is, that though the plaintiff had notice of *Oswin's* bankruptcy in July, in the month of January following he settled an account with the defendants, including the very policy in question, without making any complaint with regard to *Oswin's* name being struck off the policy, or any demand of the sum for which *Oswin* was liable. This settlement of accounts, I think, clearly amounted to a waiver of any right he might have.

have had upon the defendants, and was an election to seek his remedy under *Oswin's* commission.

1812.
OVINGTON
v.
BELL
and another.

Plaintiff nonsuited.

Garrow and *Marryat* for the plaintiff.

Scarlett for the defendants.

[Attornies, *Swain & Co.* and *Palmer & Co.*]

Vide *Edgar v. Bumpstead*, 1 Campb. 411. *Bousfield v. Creswell*, 2 Campb. 545.

ORD AND TWO OTHERS v. PORTAL.

Wednesday,
May 27.

ACTION by the plaintiffs as indorsee against the defendant as acceptor of a bill of exchange, drawn by one *Sted*, payable to his own order, and indorsed by him in blank.

Where several plaintiffs sue as indorsee of a bill of exchange, if the bill appears indorsed in blank, there is no necessity for their proving that they were in partnership together, or that the bill was indorsed and delivered to them jointly.

The plaintiff's case being closed, without shewing that the plaintiffs were in partnership, or that the bill had been indorsed to them jointly ;

Garrow, for the defendant, insisted, that they ought to be nonsuited. The declaration alleged that the drawer of the bill indorsed and delivered the bill to the three plaintiffs, and there was no evidence whatsoever in support of this allegation (a).

(a) In point of fact the plaintiffs were assignees of a bankrupt, and this bill was indorsed to them in payment of a debt due to the bankrupt estate.

1812.

ORD and
Two others
v.
PORTAL.

LORD ELLENBOROUGH.—There is no occasion for any such evidence. The indorsement in blank conveys a joint right of action to as many as agree in suing on the bill.

The plaintiffs had a verdict.

Marryat and Curwood for the plaintiffs.

Garrow and Storks for the defendant.

[Attornies, *Wuthey and Portal*.]

But where a bill of exchange is payable, or indorsed specially, to a firm, LORD ELLENBOROUGH has often ruled that in an action by the payees or indorsees, strict evidence must be given that the firm consists of the persons who sue as plaintiffs on the record.

Thursday,
May 28.

FLOWER v. YOUNG.

In an action for stores supplied to a ship, if the defendant pleads in abatement that he is only liable jointly with others, it is not enough for him to produce the ship's register, containing the names of himself and those others as owners of the ship.

GOODS sold.—Plea in abatement, that the promises were made by the defendant jointly with *Joseph Metcalfe* and three other persons named.

This was an action for stores supplied by the plaintiff in the year 1803 to the ship *Swallow*, of which the defendant had acknowledged himself to be then an owner.

Scarlett, for the defendant, proposed to prove by the ship's register, that *Metcalfe*, and the other persons named

named in the plea, were co-owners at the time when the stores were supplied. 1812.

FLOWER
v.
YOUNG.

Garrow, contra, insisted that the register was not evidence for this purpose, and relied upon *Tinkler v. Walpole*, 14 East, 226.

Scarlett contended that the case cited only determined, that the register is not evidence to charge a person whose name appears upon it, and who has not signed it; but it may nevertheless be good *prima facie* evidence for a person who adopts it.

LORD ELLENBOROUGH.—How can the register be evidence for a man? If he has signed it, it is evidence against him; but it can amount to no more than a declaration that he is owner, which a man cannot convert into evidence of his own title. If the register were recognized as a public document to prove the ownership, it would be evidence both against and for all the persons whose names appear upon it. However, we can consider it as a private instrument only; and therefore, although it may be evidence as an acknowledgment against the persons who sign it, it cannot be evidence in their favour,—amounting to nothing more than their own declaration. I am sorry this objection was ever taken, as there can be no doubt that in point of fact the register does almost invariably disclose the names of the true owners; and the practice of admitting it as *prima facie* evidence, was extremely convenient. But the objection being taken, I am bound to decide, that in a case like this, the register is not to be received. Therefore, unless the defendant can

1812.

FLOWER

v.

YOUNG.

can prove by other media, that the persons he has enumerated in his plea were joint owners of the ship in question, there must be a

Verdict for the plaintiff.

Garrow and Gifford for the plaintiff.

Scarlett for the defendant.

So in the case of *Pirie v. Anderson*, M. T. 1812, in which the above note was cited, the Court of C. P. determined that

in an action on a policy on ship, the register is no evidence to prove the allegation of interest.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM AT WESTMINSTER.

GRAVES v. ARNOLD.

Thursday,
May 15.

A local act of parliament provides that no action shall be commenced for any thing done in pursuance of the act until after notice of action shall have been given. *Held* that this applies to a case where the defendant acted under colour of the act, although he exceeded the powers conferred by it.

TRESPASS and false imprisonment. Plea, *Not Guilty*.

In the night of the 23d of January last, the plaintiff was apprehended by a watchman in the parish of St. Luke, in the county of Middlesex, on suspicion of having broken a lamp, and carried to the watch-house of that parish, where the defendant was presiding as constable. It was taken as a fact, that the watchman stated the reason for which he apprehended the plaintiff, and brought him there, but did not make a regular charge against him. The defendant ordered him to be detained all night in the watch-house, and carried

carried next morning before a magistrate, by whom he was discharged, as the watchman had not seen him break the lamp.

1812.
GRAVES
v.
ARNOLD.

The defendant's counsel took a preliminary objection, that no notice of action had been given by the plaintiff. The police of this parish is regulated by stat. 50 G. 3. c. cxlix. intituled, "An Act for making more effectual provision for lighting, watching, paving, cleansing, regulating, and improving the streets and other public places in the parish of Saint Luke, in the county of Middlesex." This act points out the manner in which constables and watchmen shall be appointed and do duty for the different divisions of the parish. By § 68. it is enacted, that if any person shall break or injure any lamp erected by the trustees within the parish, it shall be lawful for any one *who shall see such offence committed*, to seize the offender, without any warrant, and to deliver him into the custody of a peace officer, for the purpose of being carried before a magistrate. And § 173. provides, "that no action or suit shall be commenced against any person or persons *for any thing done in pursuance of this act*, until after twenty days notice in writing shall be thereof given to the clerk or clerks to the said trustees, or after sufficient satisfaction made or tendered, or after six calendar months next after the fact committed, for which such action or actions, suit or suits, shall be so brought; and that the defendant or defendants may plead the general issue, and give this act and the special matter in evidence, at any trial or trials which shall be had thereupon; and that the matter or thing for which such action

" or

1812.

GRAVES

v.

ARNOLD.

“ or actions, suit or suits, shall be brought, was done
 “ *in pursuance and by the authority of this act.*” Even
 supposing that the defendant was entirely innocent of
 the offence charged upon him, and that the watchman
 was not justified in apprehending, or the defendant in
 detaining him, it was contended, on the authority of
Weller v. Toke, 9 *East*, 364. that notice of action was
 necessary.

On the other side they insisted, that the provision
 as to notice applied only to the removing of buildings
 and other things done by the direct orders of the
 trustees, and for which they would themselves be
 answerable; that if the plaintiff was clearly innocent
 of breaking the lamp, his apprehension and imprison-
 ment could in no sense be said to have been done *in*
pursuance of the act; and that even if the defendant
 would have been entitled to notice, had he detained
 the plaintiff upon a groundless charge regularly made
 before him as constable, by detaining the plaintiff
 without any charge, he was in the situation of a com-
 mon unprivileged wrong-doer.

Sir JAMES MANSFIELD, C. J. was of opinion, that
 notice was necessary, as the defendant was acting
 under colour of the statute, and believed himself to be
 exercising the powers conferred by it, although by
 virtue of the statute he might not be justified in what
 he did.

The plaintiff was nonsuited.

* *Lens*, Serjeant, and *Bevan*, for the plaintiff.

Best, Serjeant, and *Campbell*, for the defendant.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after, Trinity Term,

52 GEORGE III.

FIRST SITTING AFTER TERM AT WESTMINSTER.

MARGARET ALCIATOR *v.* SMITH.

1812.

Thursday,
June 18.

ACTION by the indorsee against the drawer of a bill of exchange.—Plea, alien enemy.—Replication, that the plaintiff, before and at the time of the commencement of this suit, was resident in this kingdom by the licence and permission of our lord the king; whereupon issue was joined.

Where to a plea of alien enemy the plaintiff replied that she was resident in this kingdom by the licence and permission of our lord the king,—*held*, that it was not enough to prove that a licence was granted to her under 38 Geo. 3. c. 77. which expired with that statute; and that she has since continued to reside openly in this country without molestation.

The plaintiff, who is a native of France, came into this country in the year 1797, and has resided openly in London ever since. On the 5th of October 1798, she obtained a licence under 38 Geo. 3. c. 77. Soon after the passing of 43 Geo. 3. c. 155. she registered her place of abode at the Queen-Square Police Office; but she obtained no other licence till 1st June 1812, when the present cause was at issue.

Garrow

1812.

MARGARET
ALCIATORv.
SMITH.

Garrow for the plaintiff contended, that under these circumstances she must be taken to have been resident here at the time of action brought by the permission of our lord the king. His power to grant this did not depend upon the statute, but was an inherent prerogative of the crown. Therefore the first licence of 1798 might still be considered as in force. At any rate, from the long and unmolested residence of this lady in England, it might be presumed that she resided here by the licence of the king, which need not necessarily be in writing.

LORD ELLENBOROUGH.—The first licence is not granted by the king in virtue of the prerogative royal, but by an officer of state under the provisions of a particular statute; therefore when that statute expired, the licence of 1798 must have expired along with it. The licence granted 1st June 1812 contains no recital of any permission to the plaintiff to reside here, and there is no evidence that Government knew of her being in this kingdom at the time when the action was commenced. How can the jury say, therefore, that she was then resident in this kingdom with the licence and permission of our lord the king?

Plaintiff nonsuited.

Garrow and *E. Lawes* for the plaintiff.

Marryat for the defendant.

[Attornies, *Raphael* and *H. yward*.]

Vide Boulton v. Dobree, 2 Campb. 163.

FIRST

FIRST SITTINGS AFTER TERM IN LONDON.

ROCHE v. CAMPBELL.

1812.

Friday, June 19.

THIS was an action by the indorsee against the indorser of a promissory note. The declaration stated the note to be made by one *Owen Saunders*, "by which said note the said *Owen Saunders* promised to pay to one *Richard Saunders* or order, 31 days after date of the said note, the sum of £40. sterling, value received of him."

If a promissory note is made payable at a particular place, it is a fatal variance to omit to state this in declaring on the note.

The note given in evidence was in the following form :

"Ballindeary, Aug. 23, 1805.

"Thirty-one days after date, I promise to pay Ric^d Saunders Esq. or order, *at the house of Mr. Meade Nisbett, No. 6, Grafton Street, Dublin*, the sum of forty pounds sterling, value received of him.

"Owen Saunders."

(Indorfed)

"Rich. Saunders.

"J. Campbell."

Garrow, for the defendant, insisted there was a fatal variance in omitting to state the place where the promissory note was made payable. The declaration set out an instrument on which the maker was universally

1812.
 ROCHE
 v.
 CAMPBELL.

fully liable, without any demand of payment being made; but he could not have been sued upon that given in evidence till payment had been previously demanded "at the house of Mr. Meade Nisbett, "No. 6, Grafton Street, Dublin."

Jekyll, contrà, insisted, that in an action against the indorser it was not necessary to allege where the note was payable. The declaration averred, that it had been duly presented for payment. Whether it had or not, was matter of evidence. The instrument produced did contain a promise by *O. Saunders* to pay *R. Saunders*, or order, the sum in question, at 31 days after date. The allegation and the proof, therefore, completely corresponded.

LORD ELLENBOROUGH.—I think there is a fatal variance between them. The declaration represents the promissory note as containing an absolute and unqualified promise to pay the money. But by the instrument produced, the maker only promises to pay upon the specific condition that payment is demanded at a particular place. We have lately held, that where the place of payment is mentioned in the body of the note, it forms a material part of the instrument. There seems to be no doubt, therefore, that it should be set out in the declaration.

Plaintiff nonsuited.

Jekyll and *Nolan* for the plaintiff.

Garrow and *Adam* for the defendant.

[Attornies, *Pasmore* and *Frazer*.]

Vide *Saunderson v. Bowes*, 14 East. 500.

AD-

 ADJOURNED SITTINGS AT WESTMINSTER.

CUNNINGHAM q. t. v. WATSON.

1812.

 Monday,
 June 22.

DEBT on 5 Eliz. c. 4. f. 31. for setting one *Brookes* to work in the trade of a house-painter, he not having served an apprenticeship of seven years therein.

An action on 5 Eliz. c. 4. § 37. for setting to work a person who has not served an apprenticeship, cannot be maintained, unless the unqualified person has worked by the defendant's orders one entire month in the county in which the venue is laid.—Nor is it enough that the defendant gave him orders in this county to work, and that he accordingly did work at the business above a month in another county.

The defendant is a master house-painter, resident in Hanway Yard, in the county of Middlesex. *Brookes*, who had never before been employed as a painter, went into his service in July 1811; he was first sent to do work at the Bank of England, in the City of London, and continued working there till the 3d of September; he then went to work for the defendant at a gentleman's house in St. James's Square, where he remained eight or ten days; at the end of that time he returned to the Bank of England, and continued to work there as before till the 27th of December; on the following day, and for above a month afterwards, he was employed by the defendant to assist in painting the house of a gentleman in *Bruton Street*, in the county of *Middlesex*. The declaration was entitled generally of Hilary Term. It appeared that the defendant had given orders in Hanway Yard for *Brookes* to work at the Bank of England.

1812. *Jervis* insisted, that upon these facts the plaintiff must be nonsuited, as the defendant had not employed *Brookes* one entire month in the county of Middlesex before the commencement of the action. The words of the statute, "that every person willingly offending" or doing the contrary shall forfeit and lose for every "default forty shillings for every month," must mean, that the default should have continued a month before any penalty was incurred.

CUNNING-
HAM J. C.
v.
WATSON.

Garrow and *Lawes*, contra, contended, 1st, that the ordering of *Brookes* in Hanway Yard to work at the Bank, was an employment of him in Middlesex; and 2dly, that it was not necessary, in order to support this action, that *Brookes* should have been employed in Middlesex for one whole month together, but that any employment of him in Middlesex was enough to subject the defendant to the penalty, although no more than one penalty of 40*s.* could be incurred in any one month. If a contrary construction were put upon the statute, it might easily be evaded, by employing unqualified workmen for periods short of a month in two adjoining counties.—But,

Lord ELLENBOROUGH was of opinion, as to the first point, that the work must be done in the county in which the venue is laid (*a*); and as to the second, that no penalty is incurred till the employment of the

(a) *Vide* Butterfield v. Windle, 4 East. 385. Pope v. Davies, 2 Taunt. 252.

unqualified

unqualified person there has continued one entire month (b).

Accordingly the plaintiff was nonsuited.

Garrow and *Lawes* for the plaintiff.

Jervis for the defendant.

[Attornies, *Chippendale* and *Williams*.]

1812.
CUNNING-
HAM q. t.
v.
WATSON.

(b) *Vide* *Rex v. Barnett, post.*

ADJOURNED SITTINGS IN LONDON.

SIMMONDS v. KNIGHT and Another.

Friday, July 3.

THIS was an action of trover by a bankrupt against his assignees, for certain deeds and other property taken possession of by them under the commission to which he had surrendered.

No notice having been given under Sir *S. Romilly's* act, 49 G. 3. c. 121. § 10. that the validity of the commission was disputed, when the plaintiff had made out a *prima facie* case, the defendants put in the commission of bankrupt, and the proceedings under it, for the purpose of proving the trading, petitioning creditor's debt, and act of bankruptcy.

In an action of trespass brought by a bankrupt against his assignees to try the validity of the commission, although they are not named as assignees on the record, if he does not give any notice under Sir *S. Romilly's* act, 49 G. 3. c. 121. § 10. the commission and the proceedings under it are sufficient evidence to prove the trading, act of bankruptcy, and petitioning creditor's debt.

1815.
 SIMMONDS
 v.
 KNIGHT and
 Another.

The plaintiff's counsel insisted that these matters must be proved by strict evidence in the same manner as before the statute passed, because the defendants were not here described as assignees, and they must have known perfectly well that the very object of the action was to dispute the validity of the commission.

Lord ELLENBOROUGH.—The statute says, that “in any action to be brought by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt,” unless notice in writing shall be given in the manner therein mentioned. This is an action against the assignees of a bankrupt, and no such notice has been given. Therefore, I am bound to receive the commission and proceedings under it as evidence of the trading, petitioning creditor's debt, and act of bankruptcy. The statute is not confined to cases where the assignees are named as such upon the record, and must apply where, as in this instance, the opposite party knows they make out their title under the commission.

The plaintiff submitted to be nonsuited.

Garraw and *E. Lawes* for the plaintiff.

Park for the defendant.

[*Attornies, Boufield and Eyre.*]

Coram

Coram BAYLEY, J.

SIORDET and Another, Executors, &c. v. BRODIE.

Saturday,
July 4.

THIS was an action by the executors of an *East India* captain, who had died in the *East Indies* before the commencement of the homeward voyage, against the chief mate of his ship, on whom the command had devolved, to recover the amount of the sums he had received from the passengers brought home in the ship, for their passage and entertainment during the voyage.

If the captain of an East Indiaman dies at the outward port after having contracted to bring home certain passengers, and laid in a certain quantity of stores for the homeward voyage; and the chief mate succeeding to the command brings home these and other passengers, and provides further stores for their subsistence during the voyage; the captain's representatives are entitled to the passage money of the passengers with whom he had contracted, and the mate to that of the others; the representatives being liable to him for the portion of the stores laid in by him consumed by the former class of passengers, and he being liable to the representatives for the portion of the captain's stores consumed by the latter class of passengers.

The plaintiffs' counsel at first rested their claim upon the usage of the trade; but not being able to establish this, contended upon general principles that the passage money must belong to the representatives of the captain.—On the other hand, it was contended that the whole of this money belonged to the defendant, who had the actual command of the ship during the voyage.

BAYLEY, J.—If there be no usage upon the subject, I think the law is, that where the captain has contracted to carry passengers, and dies, his representatives are entitled to the benefit of the contract, and may maintain an action for the passage money. If the mate lays out money in purchasing stores for such passengers, he is the agent of the representatives for that purpose, and may oblige them to repay him.

1812.
 {
 SIORDET and
 Another, Ex-
 ecutors, &c.
 v.
 BRODIE.

But where, after the death of the captain, the mate contracts to carry passengers on the homeward voyage, he is himself entitled to the benefit of the contract, and may retain the whole of the passage money. If for the entertainment of such passengers, he uses any part of the stores laid in by the captain, for so much he must account to the captain's representatives.

The distinctions laid down by the learned judge were acquiesced in on both sides, and it was referred to an arbitrator to settle the account between the parties accordingly.

Garrow and Richardson for the plaintiffs.

Park for the defendant.

[Attornies, *Kaye & Co.* and *Chambers*.]

Monday,
 July 6.

GRIFFIN v. LANGFIELD and WIFE.

If goods are delivered to a carrier by the vendor addressed to the purchaser, while the latter is under the age of 21, but they do not reach him till he has attained that age, infancy is a good defence to an action brought against him for the price of the goods.

ACTIONS for goods sold to the wife *dum sola*.
 Plea, infancy.

It was sworn, that Mrs. *Langfield* came of age the 20th of *September* 1808. She then resided at *Coventry*. The goods in question were delivered, addressed to her, on the 18th of the same month, at *Burnley* in *Lancashire*, to a carrier, who is three days in travelling from thence to *Coventry*.

Park,

Park, for the plaintiff, insisted that the cause of action was not complete till the 21st, when Mrs. *Langfield* was no longer an infant. While the goods were in the custody of the carrier, the plaintiff might have stopped them, and when they were delivered into her hands a promise accrued to pay for them.

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GRIFFIN
v.
LANGFIELD
and Wife.

LORD ELLENBOROUGH.—When the goods were delivered to the carrier the property vested in the defendant, and she might immediately have been sued for their value. Therefore, if, she was under age on the 18th, the action cannot be supported.

The Jury disbelieving the defendants' witness, found for the plaintiff.

Park and *Reader* for the plaintiff.

Topping and *Campbell* for the defendants.

[Attornies, *Mason* and *Hurd*.]

Vide *Dutton v. Solomonson*, 3 Bof. & Pul. 582.

Wednesday,
July 8.

STEVENS v. ELIZÉE.

Notwithstanding the order of the Lord Chancellor that commissions of bankrupt shall be sued out against parties by their real names, if a commission issues against a man by a wrong name, under which he obtains his certificate;—while the commission remains unsuperfeded, a plea of bankruptcy to an action brought against him by his right name, will be supported by production of the certificate, and proof that he is really the person against whom the commission issued.

ACTION on bill of exchange. Plea, Bankruptcy.

The bill being proved, the defendant put in a certificate under a commission of bankrupt issued (as he alledged) against him, under the name of *Vincent Tallachon*. He was a *French* emigrant; and he has gone in this country by the name of *Pere Elizée*; but *Vincent Tallachon* was stated to be his true name, by which he had been known in *France*.

Garrow, for the plaintiff, insisted that this certificate was a mere nullity. By an order of the Lord Chancellor, it was strictly ordered that commissions of bankrupt should issue against persons by their real names, that is to say, the names by which they are known in the world. The defendant, therefore, ought to have been denominated "*Pere Elizée*," in any commission of bankrupt sued out against him, or "*Pere Elizée alias Vincent Tallachon*." An advertisement to the creditors of *Vincent Tallachon*, conveyed no information to the plaintiff, or any of the other creditors of *Pere Elizée* in *England*, who never heard of such a person as *Vincent Tallachon* in their lives.

LORD ELLENBOROUGH.—What you state may be a very good ground for applying to the LORD CHANCELLOR to have the commission superfeded; but if
it

it really did issue against the defendant, while it remains in force I must give effect to the certificate. I shall require evidence, however, that he was once called *Vincent Tallachon*, and that he is the individual against whom under that name the commission issued.

1812.

STEVENS

v.

ELIZEE.

This the defendant was unable to prove, and the plaintiff had a verdict.

Garrow and *Reader* for the plaintiff.

Park and *Andrews* for the defendant.

ANN NATHAN v. COHEN and three others.

Wednesday,
July 8.

TRESPASS and false imprisonment.

The defendants pleaded the general issue, under which they proposed to give in evidence that the plaintiff having assaulted the defendant *Cohen*, he procured a warrant against her addressed to the three other defendants, who are constables of the city of *London*, and that it was by virtue of this they had taken her into custody, *Cohen* having pointed her out.

If A. obtains a warrant against B. directed to C. and D. as constables, and voluntarily assists them in executing it, to trespass and false imprisonment brought by B. against the three others, A. as well as C. and D. may plead the general issue, and give the special matter in evidence.

The plaintiff's counsel denied that this was any defence under the general issue to *Cohen*, who obtained the warrant, and though not named in it, voluntarily caused the plaintiff to be taken into custody.

Lord

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ANN

NATHAN

v.

COHEN and
three others.

LORD ELLENBOROUGH.—When *Cohen* pointed out the plaintiff to the other defendants, who are constables, though himself the prosecutor, I think he was acting in *their aid*, within the meaning of 21 Jac. 1. c. 12. and he is therefore entitled to the protection of the statute.

Plaintiff nonsuited.

Park and Comyn for the plaintiff.

Garrow, Serj. *Lawes*, and *Andrews*, for the defendants.

[Attornies, *Harris* and *Fisher*.]

Vide 24 Geo. 2. c. 44. 42 Geo. 3. c. 85. and 43 Geo. 3. c. 141.

Thursday,
July 9.

DE BERNALES v. WOOD.

In an action to recover back a deposit paid on the purchase of an estate, the vendor not being able to make a good title, if the plaintiff declare specially, and allege as special damage that he has lost the use of his money; on making out his case, he will be entitled to interest on the deposit money from the time the

ACTION on an agreement for the sale of an estate, to recover back the deposit.

The plaintiff declared specially, and alleged, by way of special damage, that by reason of a good title not being made, he had lost and been deprived of the use and benefit of the money he had deposited according to the conditions of sale.

It was clearly proved, that the estate was incumbered with judgments, so that a good title could not be

be made; and the only question was, Whether the plaintiff was entitled to interest on the deposit.

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DE BER-
NALLES
v.
WOOD.

Lord ELLENBOROUGH.—We have lately held, that interest is not recoverable on money lent, without some evidence of a contract for that purpose; but I think the plaintiff here ought to be allowed interest as special damage, from the day when the purchase ought to have been completed. He avers in his declaration, that by the defendant's breach of contract he has since lost the use of his money; and he has proved that averment. There seems to be no reason, therefore, why this loss should not be compensated to him by the allowance of interest on his deposit.

Verdict accordingly.

Topping and *Scarlett* for the plaintiff.

Garrow and *Richardson* for the defendant.

[Attornies, *Liverfedge* and *Beardon*.]

See the cases on this subject collected in *Calton v. Bragg*, 15 East, 223.

Saturday,
July 11.

GREEN and Others, Assignees of SOUTHEY a Bankrupt, v. AUSTIN.

An action for money had and received cannot be maintained by a landlord to recover the amount of a year's rent against the sheriff, who has sold his tenant's goods under an execution.

MONEY had and received. Plea, the General Issue.

This was an action against the late sheriff of Surrey, to recover the sum of £25., being the amount of a year's rent due to the bankrupt from a tenant, whose goods to a greater value the defendant had sold under a writ of *feri facias*. And it was contended, that as under 8 *Ann. c. 14.* the sheriff ought to have paid the landlord a year's rent before satisfying the execution, the price of the goods in his hands became money had and received to the landlord's use.

Lord ELLENBOROUGH however held, after referring to the statute, that money had and received would not lie, and the proper remedy was a special action on the case against the sheriff for removing the goods from the premises under the execution before the year's rent was paid to the landlord.

Plaintiff nonsuited.

Garrow and *Marryat* for the plaintiff.

Park and *Lawes* for the defendant.

[Attornies, *Oakley* and *Monney*.]

Vide *Rothery v. Wood*, ante 24.

Instead of bringing an action, however, the landlord may move

the Court that he may be paid by the sheriff what is due to him out of the money levied. *Hinchett v. Kimpson*, 2 Wils. 140.

PEARSE v. PEMBERTHY and Others.

Monday,
July 26.

THIS was an action against the makers of a promissory note, "payable at *Were, Bruce, and Co.'s*." Being presented there for payment when due, the answer was, "Not sufficient effects."

In an action against the maker of a promissory note payable at a banking house, it is not necessary to prove that he had notice of its dishonour.

The only point made for the defendants was, that they were entitled to notice of its dishonour. The place where it was made payable being, according to recent decisions, a material part of the instrument; it exactly resembled a bill of exchange, the bankers standing in the place of the drawees. Had it been a bill of exchange the defendants were clearly entitled to notice; for they had some effects in the hands of *Were, Bruce, and Co.*; and there was the same reason for their receiving notice, although the form of the instrument was different. They might suppose that the bankers would pay the note, and they ought as early as possible to have had the information that it would be necessary for them to provide for it themselves, and that their balance at the banking-house remained unappropriated. The necessity of notice to the maker of a promissory note of its dishonour, results from the determination that his liability does not attach, till payment has been demanded at the place where it is expressed to be payable.—But

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PEARCE

v.

PEMBERTHY
and others.

Lord ELLENBOROUGH clearly held, that notice was unnecessary ;—and

The plaintiff had a verdict.

Garrow and Lawes for the plaintiff.

Burrough and Campbell for the defendants.

[Attornies, *Pearce and Follett.*]

Vide Callaghan v. Aylett, 2 Campb. 549. *Fenton v. Goundry*, 13 East, 459. *Saunderson v. Bowes*, 14 East, 500.

BEVERIDGE v. BURGIS.

To excuse the not giving of regular notice of the dishonour of a bill of exchange to the indorser, it is not enough to shew that the holder, being ignorant of his residence, made inquiries upon the subject at the place where the bill was payable.

THIS was an action by the indorsee against the indorser of a bill of exchange.

The plaintiff had given the defendant no notice of its dishonour till several months after it became due ; the excuse alleged for this omission was, that the plaintiff was ignorant of the defendant's address, which did not appear upon the bill. But the only evidence adduced to shew that he had used any diligence to discover this was, that he had made inquiries upon the subject at a house in the *Old Bailey*, where the bill was made payable by the acceptor.

LORD ELLENBOROUGH.—Ignorance of the indorser's residence may excuse the want of due notice ; but the party

party must shew that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should be obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared upon the bill, and application might have been made to persons of the same name with the defendant, whose addresses are set down in the directory.

Plaintiff nonsuited.

Park and *Nolan* for the plaintiff.

Garrow and *Selwyn* for the defendant.

[Attornies, *Jones* and *Smart*.]

Vide *Bateman v. Joseph*, 12 East, 433. 2 Campb. 461.

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BEVERIDGE
v.
BURGIE.

OXFORD CIRCUIT.

SUMMER ASSIZES, 52 GEORGE III.

GLOCESTER.

Coram LE BLANC, J.

1812.

Saturday,
July 18.

REX v. WALKER.

An indictment against an accessory to a felony, stating that the felony was committed by a person to the jurors unknown, cannot be supported if the principal felon was a witness before the grand jury.

THIS was an indictment against the prisoner as accessory before the fact to a larceny. The indictment charged, that *a certain person to the jurors unknown*, feloniously stole, took, and carried away six bushels of wheat of the goods and chattels of one *J. Oliver*, and that the prisoner incited, procured, and hired the said *person unknown* to commit the said felony.

The grand jury had found the bill upon the evidence of *Charles Iles*, who acknowledged that he had stolen the wheat; and it was now proposed to call him as a witness to establish the guilt of the prisoner. But the facts being opened by *Taunton* for the prosecution;—

LE BLANC, J.

LE BLANC, J. interposed, and directed an acquittal. He said, he considered the indictment wrong, in stating that the wheat had been stolen by *a person unknown*; and asked how the person who was the principal felon could be alleged to be unknown to the jurors, when they had him before them, and his name was written on the back of the bill?

1812.
REX
v.
WALKER.

So in an indictment for larceny, though the goods may be laid to be the property of *persons unknown*, if the owner be really known, such an allegation is improper. In that case, the prisoner must be discharged of the indictment laying the goods to be the property of persons unknown, and tried upon a new one, for stealing the goods of the owner, by name. See 2 East. P. C. 651. 781.

MONMOUTH.

Coram THOMSON, B.

REX v. JOHN BALDWIN.

Tuesday,
July 21.

THIS was an indictment for receiving stolen goods, knowing them to have been stolen. The indictment stated, that the goods had been stolen by Isaac Powell, and that he had been duly convicted of this felony at the Great Sessions for the county of Brecon.

To support an averment in an indictment for receiving stolen goods, that the principal felon had been duly convicted, it is sufficient to give

in evidence the examined copy of a record shewing that he was found guilty of the felony before a court of competent jurisdiction, however informal the proceedings may appear, and however erroneous the judgment on the felon.

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REX

v.

JOHN
BALDWIN.

An examined copy of the record of Powell's conviction was given in evidence, which concluded in the following manner: " Good and lawful men
" of the county aforesaid, being chosen, charged,
" and sworn to inquire between our Sovereign
" Lord the King and the said Isaac Powell, of the
" felony aforesaid, do upon their oath say, that the
" said Isaac Powell is guilty of the felony whereof he
" stands indicted, and find the value of the several
" goods and chattels so feloniously stolen, taken, and
" carried away, to amount to the value of 40s. and
" the said Isaac Powell in mercy, &c."

Hughes, for the prisoner, objected that this record was so informal and absurd, that it could not be considered sufficient to support the averment that Powell had been duly convicted of the felony. From the jury having found the value of the goods, and the Court having adjudged the defendant to be amerced, it might as well be taken to be a record in a civil suit.

THOMSON, B.—I never did before hear of a felon being "in mercy." But the judgment is not necessary, and may be rejected. The conviction, I conceive, is sufficient. In the common case, where the receiver is tried with the thief, there is no judgment upon the thief before the verdict against the receiver. This record is full of errors; but an erroneous attainder of the principal is sufficient as against the accessory till reversed.

The prisoner was found guilty.

Bevan

Bevan and Moysey for the prosecution.

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Hughes for the prisoner.

REX

v.

JOHN

BALDWIN.

In *Hyman's case*, Kingston assizes 1801, 2 East. P.C. 782. On a reference to the judges it was determined, that in an indictment against a receiver of stolen goods, it is sufficient to state the *conviction* (without the *attainder*) of the principal felon.

SHREWSBURY.

CORAM LE BLANC, J.

BECK AND OTHERS v. EVANS AND ANOTHER.

ACTION against the defendants as common carriers, for negligence in the carriage of a cask of brandy from London to Shrewsbury.

A notice by carriers that they will not be answerable for any goods above the value of 5l. unless the value be declared, and a premium paid above the common carriage, does not apply to goods, which from their bulk and appearance, must be known to exceed the specified value

This cask, containing 143 gallons of brandy, was delivered to the defendants in London, and they were aware of its contents. It was booked in the usual manner, nothing being paid upon it by way of insurance. When the defendants' waggon in which it was conveyed got near Birmingham, the cask was observed to leak very much. The waggoner, however, never unpacked it till he reached Wellington, in

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BECK
and others,

v.
EVANS and
another.

Shropshire,—by which time a considerable part of the brandy had run out.

The defence chiefly relied upon was, that a notice in the following form had been put up in the defendants' waggon office :

“ Public Notice.

“ The proprietors of the London and Salop wag-
“ gons give this public notice, that they will not be
“ answerable for cases, bank-notes, writings, jewels,
“ plate, watches, lace, silk, hose, wool, muslins, china,
“ glass, paintings, or any other goods of what nature
“ or kind soever, above the value of five pounds, if
“ lost, stolen, or damaged, unless a special agreement
“ is made, and an adequate premium paid, over and
“ above the common carriage ; such value to be spe-
“ cified and entered at the time of the delivery here,
“ or to any of their offices or agents in the different
“ parts of the kingdom.

“ Messrs. Barnett & Co.

“ Proprietors.”

As this notice was expressly extended to any goods *of what nature or kind soever*, the defendants' counsel contended it must necessarily apply to *a cask of brandy* ; and as no special agreement had been made, or premium paid over and above the common carriage for that in question, according to a great number of decided cases, the defendants could not be answerable for the damage it had sustained.—But—

LE BLANC, J. declared himself of opinion, that the notice must be confined to things of the same description as *cash, bank-notes, jewels, and watches*, the value of which could not well be discovered unless declared by the owner; but that where there were casks, the contents of which were known, so that they must evidently be above the value of £5. the notice did not apply.

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BECK
and others,
v.
EVANS and
another.

The plaintiff had a verdict; and in the ensuing term the Court of K. B. refused a rule to shew cause why there should not be a new trial, fully concurring in the opinion delivered by the Learned Judge at Nisi Prius.

Dauncey, Abbott, and Puller, for the plaintiff.

Jervis and Campbell for the defendant.

Vide Clay v. Willan, 1 H. Bl. 298. Izett v. Mountain, 4 East. 371. Nicholson v. Willan, 5 East. 507.

ADJOURNED SITTINGS BEFORE MICHAELMAS
TERM, 53 GEO. III.

Friday, Oct. 30.

WACKERBARTH v. MASSON.

Where, in a contract for the sale of sugar, there is the following term ;
“ free on board a foreign ship,” the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name.

THIS was an action for not accepting or paying for sugars bought by the defendant from the plaintiff under the following contract :

“ London, 17 Jan. 1812.

“ Mr. *Wm. Masson*,

“ Bo^t of Mr. *J. H. Wackerbarth*,

“ 95 Hds. Dble. Loaves, at 78/ Free on board a
“ foreign ship.—Prompt 2 months—a bill at 2 months
“ with interest.”

At the time of the sale, these sugars were lying in a bonded warehouse for exportation. On the 20th of *March* the defendant sent a letter to the plaintiff, requiring him to weigh off and deliver the sugars, and afterwards demanded an order to have them transferred into his name in the warehouse-keeper's books. The plaintiff refused to do so ; but offered to put the sugars on board any ship the defendant should name. The defendant still insisted upon having an order for the delivery of the sugars, and, being unable to procure this, intimated to the plaintiff that he entirely renounced the contract.

It appeared, that when sugars are sold for exportation in this manner, the seller is entitled to a bounty,
I . which

which he receives when they are bonded. It is usual for the purchaser to name a ship, on board of which they are put by the seller; but sometimes the purchaser, instead of exporting them himself, wishes to sell them again to another person; and in that case, upon an order from the seller, they are generally transferred in the warehouse-keeper's books to the name of the purchaser.

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WACKER-
BARTH
vs.
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Park for the defendant insisted, that the contract had been broken by the plaintiff; he was bound to give an order for the delivery of the goods on the 20th of *March*. The term of putting them free on board a ship, was introduced for the benefit of the purchaser, who might therefore renounce it, and insist upon the commodity being transferred to his name or delivered into his own hands.

LORD ELLENBOROUGH.—The delivery for which the plaintiff undertook was—on board a ship to be named by the defendant. He was always ready to deliver the sugars in this manner, and he offered to do so. But the defendant requires a *tertium quid*. Instead of naming a ship, he demanded to have the sugars weighed off and delivered into his own hands, or transferred to his own name in the warehouse-keeper's books. The seller might have been exposed to some risk, or might have lost some advantage by agreeing to this, and he had a right to refuse, as it was not the mode of delivery for which he had stipulated. The defendant is therefore liable for a breach of the contract in afterwards refusing to accept and pay for the goods.

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WACKER-
BARTH
v.
MASSON.

The jury fully concurred in this construction of the contract, and found a verdict for the plaintiff.

Garrow, S. G. and *F. Pollock* for the plaintiff.

Park and *Campbell* for the defendant.

[Attornies, *Lang* and *Sherwood*.]

In *Webberell v. Coape*, tried a few days afterwards in C. P. Lord C. J. Mansfield and a Special Jury put exactly the same construction upon a similar contract.

Saturday,
Oct. 31.

BELL and Others v. HOBSON.

Policy on goods "at and from Gottenburg to any port of the Baltic, beginning the adventure from the loading thereof," but declared to be in continuation of other specified policies. There were on the same goods "at and from Norfolk in Virginia," where in point of fact the goods were loaded.—Held, that under these circumstances, it was no defence to the underwriters on the first mentioned policy, that the goods were not loaded at Gottenburg.

THIS was an action on a policy of insurance on goods by the *Georgia Planter*, "at and from Gottenburg to any port or ports in the *Baltic*," declared to be "in continuation of five policies, one for £1,500, dated 16 March 1810; one for £1,600, dated 30 March 1810; one for £2,300, dated 11 April 1810; one for £500, dated 2 October 1809; and one for £1,200, dated 23 February 1810."

These five policies were all "at and from Norfolk in Virginia to a port in the *Baltic*." In the policy on which the action was brought it was stated that the adventure on the goods was to begin from the loading thereof aboard the said ship.

The goods insured in fact were loaded at Norfolk in Virginia, and when the ship touched at Gottenburg no part of them was unloaded there.

Garrow

Garrow, S. G. for the defendant contended, on the authority of *Spitta v. Woodman*, 2 Taunt. 416, and *Horney v. Lushington*, 15 East, 46. that the policy never attached, as the goods had not been loaded at the port where the risk commenced. The reference here to the other policies could make no difference, for in *Spitta v. Woodman* it was found as a fact, that the underwriters knew the goods had been loaded in the port of London.

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BELL
and others,
v.
Hosson.

LORD ELLENBOROUGH.—It was with some difficulty I could be brought to concur in the authority of *Spitta v. Woodman*. I was strongly inclined to think, the intention of the parties might well be taken to be, merely, that the goods should be in a *loaded state* at the port where the risk commenced, without necessarily being taken on board there. In this case, however, I am clearly of opinion, that the words of reference to the other policies completely remove the objection. The effect is the same as if the terms of these policies had been introduced into that on which the action is brought. *Verba relata incessé videntur*. Here it is not merely that the underwriters privately knew the real history of the voyage; but they are informed of it, or are furnished with the means of information, upon the face of the policy which they subscribed. How can they now say, we expected the cargo to be loaded at Gottenburg, when they were guilty of great negligence if they did not know that it was loaded at Norfolk in Virginia? I much wish, that to prevent these disputes, the words “wheresoever loaded,” were introduced into the printed form of the policy of insurance,

Verdict for plaintiff,
Park,

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and others

v.

HOBSON.

Park, Marryat, and J. Warren for the plaintiffs.*Garrow, S. G. and Scarlett* for the defendant.[Attornies, *Wadebon* and *Gatty*.]Saturday,
Oct. 31.

IDLE and Others v. THORNTON and Others.

Contract in London for the sale of tallow from a particular ship, on arrival—to be taken from the king's landing scale—if it should not arrive on or before a given day, the bargain to be void : The ship was wrecked off the coast of Scotland; but the cargo was saved, and might have been forwarded to the port of London by the given day : The vendors refold the tallow in Scotland : The purchasers did not offer them any indemnity if they would bring the tallow to London.—Held, that under these circumstances, the vendors were not answerable for the non-delivery of the tallow.

THIS was an action of *assumpsit* for a breach of the following contract :

“ London, 27th Sept. 1811.

“ Bought for Messrs. Christopher Idle, Brother,
 “ and Co. of Messrs. Stephen Thornton, Brothers,
 “ and Co. 200 casks first fort yellow candle tallow,
 “ at 68/ per cwt. on arrival. If it should not arrive
 “ on or before the 31st Dec. next, the bargain to be
 “ void. To be taken from the king's landing scale
 “ with customary allowances, and the amount to be
 “ paid in cash in 14 days from finishing the delivery,
 “ on deducting $2\frac{1}{2}$ per cent. discount. Ex *Catherina*,
 “ Evers.”

The first count of the declaration alleged, that the tallow did arrive in a port of Great Britain before the 31st Dec. but that the defendants refused to deliver it. The second count stated, that the tallow having been shipped on board the *Catherina* for the port of London, arrived at a certain place in Scotland on the 4th of November, and might have been conveyed from thence to the said port of London, and have arrived there before the 31st December, but that the defendants

dants prevented the tallow from so arriving, and refused to deliver it to the plaintiffs.

In point of fact, the *Catherina* with the tallow on board was wrecked off *Montrose* on the 4th of November 1811. The greater part of the tallow was saved; and it might have been forwarded to London before the 31st of December. The defendants did not order it to be so forwarded, but afterwards sold it to a merchant in Leith. The plaintiffs, however, on hearing of the accident, did not offer any indemnity to the defendants if the tallow should be brought to London to be delivered in pursuance of the contract.

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IDLE and
others
v.
THORNTON
and others.

LORD ELLENBOROUGH.—I see no proof of any breach of this contract. *On arrival* must mean—on arrival in the port of London; and if the tallow did not arrive there on or before the 31st of December, the bargain was to be void. It never did arrive there. Without any default of the defendants, the ship was wrecked off the coast of Scotland by the fury of the elements. How then is the bargain to be enforced? Had the defendants prevented the *Catherina* from arriving in the port of London till after the 31st of December, to be sure they would have been liable. Nothing of this sort is imputed to them. It is only said they were bound to forward the tallow gathered from the wreck. Without an indemnity I am clearly of opinion they were not; and if an indemnity had been offered, the remedy against them would perhaps have been rather equitable than legal. Suppose the ship had been cast away on the coast of Ireland, or on some more distant shore, if this action be well founded,
the

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IDLE and
others

v.

THORNTON
and others.

the defendants would still have been bound to forward the tallow to the port of London, at whatever hazard or expence. In construing such a contract, I must consider that it was the intention of the parties it should be void, unless the commodity in the ordinary course of trade and navigation arrived at the port of destination by the appointed day. Numberless disputes would otherwise arise as to the respective obligations both of vendors and purchasers.

The plaintiffs were nonsuited, and in the ensuing Term the Court of K. B. refused a rule to shew cause why the nonsuit should not be set aside.

Garrow, S. G. and Marryatt for the plaintiffs.

Park and Scarlett for the defendants.

[Attornies, *Lamb* and *Devon*.]

Vide Boyd v. Siffkin, 2 Campb. 326.

Monday,
Nov. 2.

EYRE AND ANOTHER v. GLOVER.

Expected profits may be insured by an open policy.

THIS was an action on an open policy at and from Riga to Hull, "*on profits*."

The plaintiffs proved that a quantity of hemp was shipped on their account at Riga, in the vessel mentioned in the policy, for Hull,—which, if it had arrived there,

there, would have yielded them a profit of £1,000. but that the ship and cargo were lost in the course of the voyage. *Barclay v. Cousins*, 2 East. 544. was relied upon, to shew that under these circumstances the plaintiffs were entitled to a verdict.

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 Eyre and
 another
 v.
 Glover.

Garrow, S. G. for the defendant observed, that it was a valued policy in *Barclay v. Cousins*, but that no case had determined that an open policy on profits is lawful. This could be considered nothing but a gambling transaction. Had the market fallen, then there would have been no interest, and all the premium must have been returned. A valued policy ascertains the interest; but an open policy, like this, leaves every thing uncertain.

LORD ELLENBOROUGH.—In a valued policy on goods, the expected profit may be included, the assured not being restricted in the valuation to the invoice price. This in effect is an insurance on profit; and what may be insured jointly with something else, may be insured by a separate policy. The circumstance of the policy in this case being open, does not seem to me to make any further difference, than to throw upon the assured the burthen of shewing the amount of the profit they would have made had the goods arrived. *Certum est quod certum reddi potest*. The plaintiffs have distinctly proved that they had a cargo on board the ship, which, had it arrived, would have yielded them a profit of £1,000. They have therefore been damnified to that amount beyond the prime cost of the goods; and there seems no reason why they should not be indemnified for this loss by a policy

1812.

**EYRE and
another**

v.

GLOVER.

policy of insurance. Whether any profit was to arise did, to a certain degree, depend upon the state of the market; but there was no more gambling in this than in any other mercantile transaction; and when it is once known that a profit would arise upon the goods if they arrived, the insurance (which otherwise would not attach for want of interest) becomes strictly a contract of indemnity.

Verdict for the plaintiffs.

Park and Scarlett for, the plaintiffs.

Garrow, S. G. and Richardson for the defendants.

[Attornies, *Raffier* and *Reardon*.]

Vide Grant v. Parkinson, Park, 354. 6th ed. Knox v. Wood, 1 Campb. 543.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

53 GEORGE III.

SECOND SITTINGS IN TERM AT GUILDHALL.

PIRIE and another, Assignees of HAMILTON a Bankrupt *v.* MENNETT.

1812.

Saturday,
Nov. 21.

THIS was an action to recover the sum of £123. 5s. for premiums due upon certain policies of insurance, effected by the defendant as an insurance-broker, and underwritten by the bankrupt.

In an action by the assignees of a bankrupt, it is not sufficient proof of a set-off, that the commissioners permitted the defendant to prove the debt proposed to be set off under the commission.

The defence was, that losses had happened upon these policies before the bankruptcy to a larger amount than the premiums, and that the defendant having had a *del credere* commission, he had a right to set off these losses in the present action.

The only evidence tendered to prove the set-off was, that the commissioners had permitted the defendant to prove

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PIRIE and
another, Af-
signees of
HAMILTON
a Bankrupt
v.
MENNETT.

prove upon Hamilton's estate the sum of £285. as the amount of the losses upon the policies in question.

Scarlett, for the defendant, contended that this was sufficient under 5 Geo. 2. c. 30. s. 28. which enacts, "That where it shall appear to the said commissioners, or the major part of them, that there had been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." Here the commissioners had stated the account between the bankrupt's estate and the defendant, and had adjudged that the latter had a right to claim from the former the sum of £285. The plaintiffs could therefore only recover what appears to be due on the balance of such account, and on setting such debts against one another. But the balance being in favour of the defendant, the plaintiffs must be non-suited.

LORD ELLENBOROUGH.—I cannot receive the proof of the debt as sufficient evidence of the losses. When the commissioners permitted the defendant to prove, they can neither be considered as having done a binding judicial act, nor as having represented the assignees, and thus assented to the defendant's demand. If it

can be shewn that the assignees acknowledged that the proof was just, it would then be sufficient evidence against them.

Verdict for the plaintiffs.

Garrow, S. G. and *Abbott* for the plaintiffs.

Scarlett for the defendant.

[Attornies, *Wild* and *Blunt*.]

1812.
PIRIE and
another, Af-
signees of
HAMILTON
a Bankrupt
v.
MENNETT.

FIRST SITTINGS AFTER TERM AT
WESTMINSTER.

COLLOTT AND OTHERS v. HAIGH.

Monday,
Nov. 30.

THIS was an action on a bill of exchange, drawn by the defendant upon *J. Dufston*, accepted by him, and indorsed to the plaintiffs.

The drawer of an accommodation bill is not discharged by time being given to the acceptor.

It appeared that when the bill became due, the plaintiffs gave time for some weeks to *Dufston*, upon his lodging some security in their hands, which did not turn out to be available; but it was likewise proved that *Dufston* had accepted the bill merely for the defendant's accommodation, without any consideration whatsoever.

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- and others
v.
HAIGH.

LORD ELLENBOROUGH ruled, that under these circumstances the defendant was not discharged by the time given to the acceptor.' The drawer of an accommodation bill must be considered as the principal debtor, and the acceptor only in the light of a surety. The reason why notice of the dishonour of a bill must in general be given to the drawer is, that he may recoup himself by withdrawing his effects from the hands of the acceptor; and he is discharged by time being given to the acceptor without his consent, because his remedy over against the acceptor may thus be materially affected. But where the bill is accepted merely for the accommodation of the drawer, he has no effects to withdraw, and no remedy to pursue when compelled to pay. He therefore suffers no injury either by want of notice, or by time being given to the acceptor; and in an action on the bill he cannot defend himself upon either of these grounds.

Verdict for the plaintiff.

Park and Bolland for the plaintiff.

Garrow, S. G. for the defendant.

[Attornies, *Farlow and Stratton*.]

Vide Laxton v. Peat, 2 Campb. 185.

CURRIE v. CHILD, PRITCHARD, AND BROWN.

Wednesday,
Dec. 2.

ACTION against the defendants, as makers of a promissory note. *Child* pleaded his bankruptcy, and the two others the general issue.—The note being proved,—

Where, in an action against two defendants, one pleads his bankruptcy, and the other, the general issue, the former, cannot, on proof of his certificate, be made a witness for the latter.

Jervis, for the defendants, put in *Child's* certificate allowed by the Lord Chancellor; and proposed that a verdict in his favour should be recorded, and that he should then be called as a witness for the other two, to prove that the note had been altered in a material part after it was negotiated.—But—

Lord ELLENBOROUGH refused to permit this course to be pursued, and the jury found a verdict for the plaintiff against *Pritchard* and *Brown*, and in favour of the defendant *Child* at the same time (*a*).

In this case the note was attested by a person who has since become insane; and on proof of his insanity, Lord ELLENBOROUGH held, that evidence of his hand-writing was sufficient to prove the making of the note (*b*).

Where an attesting witness becomes insane, the instrument may be proved by evidence of his hand-writing.

Park and *Raine* for the Plaintiff.

Jervis and *Tindal* for the Defendants.

[Attornies, *Rigg* and *Goodchild*.]

(*a*) *Vide* Chapman v. Graves, 2 Campb. 333. n.

(*b*) *Vide* Adams v. Ker, 1 Bos. & Pul. 360. Cunliffe v. Sefton, 2 East 183.

Thursday,
Dec. 3.

WARD v. SCOTT.

Where a statute points out the particular manner in which a canal company shall sell and convey lands, and enacts that every such sale and conveyance shall be valid and effectual to all intents and purposes, this does not cure any defect in the title to lands so sold and conveyed by the company.

THIS was an action for money had and received against an auctioneer, to recover the sum of £98. being the amount of a deposit paid him by the plaintiff on the purchase of a piece of land near Paddington, from the Grand Junction Canal Company.

The abstract handed over to the plaintiff began only in the year 1800, with a conveyance of the premises to the Grand Junction Canal Company, encumbered by a mortgage for £500.; and it was allowed that as between two individuals, the title would have been defective. But it was contended, that this was cured by the acts for establishing and regulating the Grand Junction Canal Company. Stat. 33 Geo. 3. c. 80. authorizes the Company to buy land for the making of the canal, and to resell such parts as are not used for that purpose, and declares that "such sales, conveyances, and assurances, shall be valid and effectual in law, to all intents and purposes whatsoever, any law, statute, usage, or custom to the contrary in anywise notwithstanding." And stat. 34 Geo. 3. c. 24. after prescribing the mode in which the company shall sell and convey to a purchaser, enacts, that every such sale and conveyance shall be valid and effectual.

Garrow, S.G. for the defendant insisted, that as the piece of land in question had been bought and sold by the Grand Junction Canal Company, according to the provisions

provisions of these acts, *the sale was valid and effectual*, and the title could not be objected to.

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WARD

v.

SCOTT.

Park, contra, observed, that according to this doctrine, all the defective or wrongful titles in England might be completely cured by being drawn through the Grand Junction Canal.

LORD ELLENBOROUGH.—I must suppose that the words in the statutes relied upon refer only to the mode in which the conveyances are made, without having any operation upon the title to the subject-matter conveyed. A contrary construction would be alarming to every landholder in the kingdom.

The plaintiff had a verdict.

Park, Topping, and *Nolan* for the plaintiff.

Garrow, S. G. and *Fell* for the defendant.

[Attornies, *Regg* and *Solic.*]

JONES v. EDNEY.

Friday, Dec. 4.

MONEY had and received, to recover back the sum of £105. paid as a deposit upon the purchase of the lease of a public house called the **GENERAL ABERCROMBIE**.

In the conditions of sale of the lease of a public house, it was described as "a free public house;" the lease

contained a covenant that the lessee and his assigns should take their beer from a particular brewer: this lease was all read over by the auctioneer at the time of the sale, who said mistakenly that it was a *free public house*, and that the covenant about the beer had been decided to be bad — *Held*, that a purchaser who heard the lease read over, was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit.

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JONES

v.

EDNEY.

In the conditions of sale this was described as “*a free public house*,” that is to say, that the tenant was not bound by the terms of the lease to take his beer from any particular brewer. The lease in fact contained a proviso, that the lessee and his assigns should take all their beer from the brewery of *Elliott & Co.* or pay a very high advanced rent. At the sale the auctioneer read over the whole lease in the hearing of the bidders. When he came to the clause about taking the beer, he was asked, How the house could be called “*a free public house?*” He answered, “That clause has been done away with. There has been a trial upon it before Lord Ellenborough (a),”
 “who

(a) The case alluded to, was *Cooper v. Twibill*, tried before Lord ELLENBOROUGH at the Westminster Sittings after Trinity Term 1808.

Replevin for taking the plaintiff's goods in the *General Abercrombie public house*. Avowry for arrears of an advanced rent, on account of the plaintiff not having purchased the beer sold in his house from *Messrs. Elliott and Call*. Plea in bar, that *Messrs. Elliott & Call* delivered to the plaintiff bad, nauseous, and unwholesome beer, to be sold by him in his public house, by reason whereof he lost divers customers; that he required *Messrs. Elliott & Call* to take back the bad beer and send him

some which was good, but they refused to do so; and thereupon, and not before, for the necessary supply of his customers, he purchased beer from other persons.

Replication, *de injuria sua propria absque tali causa*.

Lord ELLENBOROUGH said, in summoning up to the jury, “I hope this is the last time I shall see such a provision in any lease; for it is too much that any man should by his own act, without the intervention of a court, be enabled to proceed in a summary way, and to distrain *gravi manu* for that which is a penal. y. The whole of these leases by which people of the description of the plaintiff are prevented from having the
 article

“ who has decided it to be bad. I warrant it as a free public house, and sell it as such.” The plaintiff was the highest bidder, and paid 100 guineas deposit; but finding that the clause might still be enforced, he refused to complete the purchase, and insisted on being paid back the deposit.

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v.

EDNEY.

Garrow, S. G., for the defendant, contended, that the action could not be maintained, as the plaintiff heard the whole lease read over, and could neither complain of concealment nor deception. He had an opportunity of judging for himself respecting the operation of the objectionable clause, or of taking the opinion of his professional adviser. The auctioneer was certainly mistaken as to the effect of Lord Ellenborough's decision in the case of *Cooper v. Twibill*, but in giving an opinion upon that subject he could not be considered as acting in his capacity of auctioneer, and his mistake could not vitiate the sale.

article they deal in from those who will serve them best, are extremely injurious to the public interest and welfare. However, no man is bound to make himself a sacrifice to such a covenant as this. On the contrary, it is his duty in respect to the public health, to resist it. If the plaintiff had gone on selling beer of a bad quality, with notice to him that it was so, and any material injury had been produced to any of his majesty's

subjects by drinking it, he would clearly have been liable to all the consequences of a criminal prosecution for selling beer of so noxious a quality. It was therefore no more than what was due to himself, for his own indemnification, that he should apply for beer elsewhere, if he was ill served by his own landlord.

The plaintiff had a verdict.

Vide *Holcombe v. Hewson*,
2 Campb. 391.

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v.

EDNEY.

LORD ELLENBOROUGH.—In the conditions of sale this is stated to be “a free public house.” Had the auctioneer afterwards verbally contradicted this, I should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into, if the written conditions of sale are to be controuled by the babble of the auction room. But here the auctioneer at the time of the sale declared that he warranted and sold this as a free public house. Under these circumstances a bidder was not bound to attend to the clauses of the lease or to consider their legal operation (*b*).

Verdict for the plaintiff.

Park, Topping, and E. Lawes, for the plaintiff.

Garrow and Lawes for the defendant.

[Attornies, Cusfle and Wiltshire.]

(*b*) *Vide* *Gunnis v. Erhart*, 1 H. Bl. 289.

Monday,
Dec. 7.

PRICE v. LITTLEWOOD.

In an action for disturbing plaintiff's enjoyment of a pew claimed in right of a messuage, an old entry in the vestry book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage, (under whom plaintiff claims) in consideration of his using it, is admissible evidence to prove plaintiff's right to the pew.

THIS was an action on the case for disturbing the plaintiff's enjoyment of a pew or gallery in the church of *Hendon*, which he claimed in right of a house occupied by him in that parish.

The

The plaintiff deduced his title to this house from *Sir William Rawlinson*, to whom it belonged in the year 1691, and offered in evidence an entry in the vestry-book, dated 8th October in that year, signed by the then churchwardens, stating that the parish church had been new leaded and repaired at the costs and charges of the parish, except the aisles over the two galleries, the one belonging to *Sir William Rawlinson*, and the other to *John Nicholls Esquire*, which were leaded and repaired at the costs and charges of the said *Sir William Rawlinson* and *John Nicholls*, in consideration of their using the said galleries.

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PRICE

v.

LITTLE-
WOOD.

Garrow, S. G. contended that this entry could not be evidence against the defendant.

LORD ELLENBOROUGH.—I think the entry is evidence in support of the plaintiff's claim. It shews the reputation of the parish upon the right; and, besides, it is made by the churchwardens upon a subject within the scope of their official authority.

The plaintiff proved, that as far back as could be traced, the pew had been used by the occupiers of the house in question, and the jury found a verdict in his favour.

Topping, *Marryat*, and *F. Pollock*, for the plaintiff.

Garrow, S. G. and *Abbott*, for the defendant.

[Attornies, *Pitches* and *Neeld*.]

Vide Stocks v. Booth, 1 T. R. 428. *Griffith v. Matthews*, 5 T. R. 296.

ADJOURNED SITTINGS IN LONDON.

Friday, Dec. 11.

DICKMAN v. BENSON.

Stat. 2 Geo. 2. c. 36. requiring articles to be entered into between the masters of ships and the mariners, and providing that the mariners shall not fail in any suit for wages from not producing the articles, does not apply to the case of a British seaman entering on board a foreign ship in a British port.

THIS was an action for wages earned by the plaintiff as a seaman on board an American ship, in a voyage from London to St. Peterburgh and back.

In the course of the trial it became material to determine, whether stat. 2 Geo. 2. c. 36. which requires articles to be entered into between the masters of ships and the mariners in all foreign voyages, and provides, that the mariners shall not fail in any suit for the recovery of wages for want of the production of these articles, applies to the case of a British seaman entering on board a foreign ship in a British port.

Lord ELLENBOROUGH, after referring to the statute, said, he was of opinion, both from its language and its policy, that it was confined to voyages on board of British ships, and that its provisions did not apply to a case like the present.

The plaintiff had a verdict.

Lawes and *E. Lawes* for the plaintiff.

Garrow, S. G. for the defendant.

[Attornies, *Theakston and West*.]

SIMPSON

SIMPSON AND ANOTHER v. SWAN.

Friday, Dec. 11.

THIS was an action for money had and received to recover the sum of £210.

The defendant, a leather manufacturer at Edinburgh, employed the plaintiffs as his factors in London, to dispose of goods which he consigned to them. Their course was, to sell these goods for a commission of two and a half per cent. When they stand *del credere*, they have a commission of four or five per cent. Having sold the defendant's goods, they usually took bills of exchange at four months from the purchasers. They then remitted to the defendant their own promissory notes for the net proceeds, falling due a day or two later than the bills of exchange. They never informed the defendant who the purchasers were, or that any securities were taken from them. The parcel of goods in question were received by the plaintiffs on the 8th of October, and on the 12th of December sold for £218. to one *Beckwith*, who then accepted a bill for the amount, payable to the plaintiffs at four months after date. On the following day the plaintiffs sent the defendant an account sales, merely mentioning the price for which the goods were sold, and the deduction for commission and charges, and inclosed their promissory note for the net proceeds, which came to £210. On the 9th of March following *Beckwith* stopped payment, and then, for the first time, the plaintiffs informed the defendant that he was the

Where a factor upon selling goods takes a security payable to himself from the purchaser, and gives his own security to the principal for the net proceeds, without disclosing the name of the purchaser; if the latter becomes insolvent before paying his security, the factor cannot compel the principal to refund the money received by him as the price of the goods.


Money had and received will not lie where the plaintiff upon the same transaction would be liable to a cross action to recover damages to an equal amount.

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 and another
 v.
 SWAN.

the purchaser of the goods, and that the defendant must consider him as his debtor. They likewise requested that the defendant would return their promissory note cancelled, or remit them money to take it up. The defendant had negotiated the note, and when it became due it was paid by the plaintiffs out of their own funds. They now attempted to prove that this transaction was conducted according to the general usage of the leather trade, and that according to that usage, where the purchaser fails after giving a bill of exchange for the price of the goods, the loss falls upon the principal, although he has previously obtained a security from the factor for the amount. But it turned out that the usage is various with regard to the mode of selling, and the only instances established of the principal refunding upon the failure of the purchaser were, where the factor had granted acceptances upon the goods before the sale. The witnesses likewise stated, that *Beckwith* was generally considered to be in insolvent circumstances at the time the goods in question were sold to him.

LORD ELLENBOROUGH.—If there had been an universal usage of trade, that under these circumstances the principal must refund to the factor and submit to the loss, it would have marked the contract between these parties. But the usage altogether fails, and we are left to the reason of the thing. If the principal draws before the sale, it is very reasonable that he should repay the money when the consideration fails on which the factor granted the acceptance. There the principal is deprived of no information, and is led into no error. But where, after the sale the fac-

tor, without mentioning to whom he has sold, or what security he has taken, remits a bill of exchange or promissory note for the net proceeds, this naturally seems to close the transaction, and completely lulls the suspicion of the principal. He has no means of resorting to the purchaser, or of exercising his judgment as to the proper mode of securing payment. He has the best ground to suppose that the factor has actually been paid, or is contented to take upon himself the responsibility of the purchaser. If this transaction can be unravelled, every man who receives a bill for his balance may be called upon at any distance of time to refund. But when a bill is given in this way, it must operate as a final settlement between the parties.—There is still another objection to the plaintiffs recovery. This is an action for money had and received, which is an equitable action, and it ought not to succeed, unless the plaintiff's claim be founded in equity and good conscience. But it would be unjust and unconscientious to throw this loss upon the defendant, if it arose from the negligence or misconduct of the plaintiffs themselves; and we have had it proved that *Beckwith*, to whom these goods were sold, was notoriously in insolvent circumstances at the time of the sale. Upon that evidence, the plaintiffs would be liable to an action for selling the goods to him; and on that ground likewise, they cannot be permitted to recover back the money they paid upon their promissory note, which they might be compelled to repay in, the shape of damages.

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 and another
 v.
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Plaintiffs nonsuited.

Garrow,

1812.

SIMPSON
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v.
SWAN.

Garrow, S. G. Topping, and Espinasse, for the plaintiffs.

Park, Scarlett, and Adam, for the defendant.

[Attornies, *Humphreys and Fraser.*]

Vide Edgar v. Bumpstead, 1 Campb. 411. Jameson v. Swainson, 2 Campb. 546. n.

Saturday,
Dec. 12.

FOWLER AND WIFE v. HOMER.

An action for defamation cannot be maintained against a man whose property has been stolen, and who upon reasonable grounds of suspicion charges an innocent person with having stolen it.

THIS was an action for defamation. *Plea, the general issue.*

The defendant is a haberdasher. On a Saturday evening, while he was absent, *Mrs. Fowler* came into his shop and bought some goods. Soon after she was gone, his shopman missed a roll of ribband, and mistakenly supposed that she had stolen it, but did not then pursue her. On the following Monday, as she was again passing the shop, the shopman pointed her out to the defendant as the person who had stolen the ribband. The defendant brought her into the shop, and accused her of the robbery, which she positively denied. He then carried her into an adjoining room, and sent for her father, to whom he repeated the accusation. After a good deal of altercation, she was allowed to go home, and there the matter rested.

Lord ELLENBOROUGH.—I am clearly of opinion that this action cannot be maintained. There appears to be no malice on the part of the defendant. I suppose this lady to be completely innocent of the offence laid to her charge ; but she has not been wantonly or maliciously calumniated. When a servant represents to a master that his goods have been stolen by a particular individual, it is justifiable for the master, with a view to inquiry, to tax that individual with the theft ; and although the suspicion turns out to be erroneous, the law gives no redress to the party accused. The accusation, though unfounded, was not malicious. No doubt it may prove very detrimental to the object of it ; but this is one of many instances, where there being a loss without an injury, the sufferer must consider himself not wronged but unfortunate. If the defendant had continued to propagate the story to strangers, that would have furnished evidence of malice ; but if he could not lawfully charge the person suspected on reasonable grounds, though innocently, of having committed the theft, it would be quite impossible for a man who is robbed to inquire with any safety after the stolen goods. From sitting in another place, I know that the shopkeepers of this town are subject to the most enormous pillage, and they must have an opportunity of protecting their property, and bringing offenders to justice.

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 FOWLER and
 WIFE
 v.
 HOMER.

This exposition of the law was acquiesced in by the plaintiffs' counsel ; but an instance was pointed out in which the defendant had rather transgressed the line of investigation above laid down, whereupon the parties agreed to withdraw a juror.

Garrow

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*Garrow, S. G. and Comyn for the plaintiffs.*FOWLER
and WIFE*Topping and J. Williams for the defendant.*

v.

HOMER.

[Attornies, *Pitman* and *Baxter*.]

Vide McDougall v. Clardidge, 1 Campb. 267. and the authorities there referred to. of felony, without a warrant, if the party suspected of the charge prove innocent. Samuel

But although a peace officer v. Payne, Doug. 353 Adams may, a private person cannot, v. Moore, Selw. N. P. 830. justify an arrest on a suspicion

Saturday,
Dec. 12.

DENT v. DUNN, Executrix, &c.

The maker of a promissory note pays money into the hands of an agent to retire it: the agent tenders the money to the holder of the note, on condition of having it delivered up: the note being mislaid, this condition is not complied with; and the agent afterwards becomes bankrupt with the money in his hands.—*Held*, that the maker

THIS was an action on two promissory notes made by the testator.

It appeared that in the year 1805, after his death, the defendant gave her agent a sum of money for the purpose of taking them up. The agent went to the plaintiff, and offered to pay him the principal and interest, on having the notes delivered to him. The plaintiff having then mislaid them, could not comply with this condition. The agent afterwards failed, with the money in his hands. The notes were not discovered till a short time before the commencement of this action.

Burroughs,

Burrough, for the defendant, insisted, that under these circumstances the action could not be maintained. The plaintiff had made the holder of the money his agent; and ought to bear the loss. The sum paid for the purpose of taking up the notes might have been recovered from the agent by the plaintiff as money had and received to his use.

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DENT
v.
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Executrix,
&c.

LORD ELLENBOROUGH.—This was only a tender of payment, which could not extinguish the debt. The money in the hands of the agent was not to become the plaintiff's till the condition of producing the notes was complied with. The holder of the money at the time of his failure still continued the agent of the defendant. No credit had been given to him by the plaintiff.

A question then arose, as to what interest the plaintiff was entitled to recover.

LORD ELLENBOROUGH.—I think interest ought to stop from the offer to pay. Interest, properly speaking, is a compensation agreed to be paid for the use of money forborne by the lender at the borrower's request. It is more frequently recovered in the shape of damages for money improperly retained by the debtor contrary to the request of the creditor. But in neither of these ways can interest continue to run after an offer to pay the principal, upon a reasonable condition, which the party to receive it refuses or is not in a situation to fulfil.

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DENT

v.

**DUNN,
Executrix,
&c.**

Verdict for the principal and interest down to the tender.

*Garrow, S. G. and Littledele, for the plaintiff.**Burrough for the defendant.*

[Attornies, Hicks and Esley.]

Vide Calton v. Bragg, 15 East 223.

Tuesday,
Dec. 15.**TUGWELL v. HEYMAN and Another, Executrix and
Executor, &c.**

If executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable, upon an implied promise, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances.

IN this action the defendants were sued as executors for the funeral expences of the testator, who left considerable property behind him. They pleaded merely *the General Issue*.

The reasonableness of the plaintiff's bill was not denied; but it appeared that the defendants had given no orders whatever respecting the funeral. The question therefore arose, whether under these circumstances they were liable upon an implied promise to the plaintiff.

Lord ELLENBOROUGH.—I think the defendants are liable in this action. It is allowed that the funeral was conducted in a manner suitable to the testator's degree and circumstances, and that the plaintiff's charge is fair and reasonable. The defendants do not deny that they

they have assets. Then will not the law imply a promise on their part to satisfy this demand? It was their duty to see that the deceased was decently interred; and the law allows them to defray the reasonable expence of doing so before all other debts and charges. It is not pretended that they ordered any one else to furnish the funeral, and the dead body could not remain on the surface of the earth. It became necessary that some one should see it consigned to the grave; and I think the executors, having sufficient assets, are liable for the expence thus incurred.

1812.

TUGWELL.
v.HEYMAN
and another,
Executrix
and Executor.

Verdict for the plaintiff.

Topping and Lawes for the plaintiff.*Garrow, S. G. and Park*, for the defendant.[Attornies, *Willoughby* and *Hartley*.]

In case of necessity, a stranger may direct the funeral, and defray the expence out of the deceased's effects, without rendering himself liable as executor de son tort. Vin. Abr. executor. B. a. 24.

EMANUEL v. DANE.

Thursday,
Dec. 17.

TROVER for a watch.

The plaintiff's case was, that he had exchanged this watch with the defendant for a pair of candlesticks,

The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be

Alleged.—Held, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal.

1812.
 EMANUEL
 v.
 DANE.

warranted to be silver, which turned out to be of base metal; and that the defendant, on the candlesticks being returned to him, had refused to deliver up the watch.

Park, for the defendant, objected, that under these circumstances, trover was not maintainable.

Topping, *contra*, insisted that the property in the watch could not be transferred to the defendant by the fraud which he had practised.

LORD ELLENBOROUGH.—Shew me that the defendant entered into a conspiracy to cheat the plaintiff in this transaction, and perhaps you may rescind the contract entirely on account of the gross fraud committed by one of the contracting parties. But unless the contract be rescinded, this action cannot be maintained. The watch remains the property of the defendant, though the plaintiff be entitled to a compensation in damages for a breach of the warranty that the candlesticks were of silver. I cannot try a question of warranty in an action of trover.

Plaintiff nonsuited.

Topping and *Andrews* for the plaintiff.

Park and *Comyn* for the defendant.

[Attornies, *Isaacs* and *Randall*.]

Vide *Weston v. Downes*, Doug. 23. *Towers v. Barrett*, 1 T. R. 133. *Lewis v. Colgrave*, 2 Taunt. 2.

CARSTAIRS and others, Assignees of KENSINGTON
and Co. Bankrupts, v. BATES. Friday, Dec. 18;

THIS was an action against the defendant, as ac-
ceptor of a bill of exchange for £230. dated
13th July 1812, drawn by *J. Allport*, payable to his
own order, at two months after date, and indorsed
by him to the bankrupts.

Where bankers discount a bill of exchange for a customer, giving him credit for the amount of the bill, and debiting him with the discount, the bill becomes the property of the bankers; and upon their bankruptcy, their assignees may maintain an action upon it, although there be no balance due to them from the customer.

Allport the drawer kept cash with *Kensington and Co.* the bankers. On the 17th of July they discounted for him this bill and two others,—one for £50. and another for £80. They credited him with the amount of the three bills, and debited him with the discount; so that, deducting the discount, they were placed to his account as cash, which he might immediately have drawn out. There was then a balance due to him of three or four hundred pounds, and his account remained *good* till the banking-house stopped payment. This happened on the 21st of July, and the commission of bankrupt was sued out the following day.

Park, for the defendant, insisted that the action could not be maintained, as the bill of exchange under these circumstances remained the property of *Allport*; and he relied upon *Giles v. Perkins*, 9 East, 12. in which it was held, that a customer paying bills not due into his bankers in the country, who credited their customers for the amount of such bills if ap-

1812.
 CARSTAIRS
 and others,
 Assignees of
 KENSINGTON
 and Co.
 Bankrupts,
 v.
 BATES,

proved as cash (charging interest), was entitled to recover back such bills in specie upon the bankers becoming bankrupt, the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy: There, Lord ELLENBOROUGH said, "Every man who pays bills not then due into the hands of his banker. places them there as in the hands of his agent, to obtain payment of them when due."

Lord ELLENBOROUGH.—Is it meant seriously to contest the right of the assignees to recover in this action? The bankers were the purchasers of this bill. They did not receive it as the agents of *Allport*. The whole property and interest in the bill vested in themselves, and they stood all risks from the moment of the discount. If the bill had been afterwards stolen or burnt, theirs would have been the loss. In *Giles v. Perkins* the bankers were mere depositaries, with a lien when the account was overdrawn. The customer there drew upon the credit of the bills deposited. Here *Allport* might have drawn out the amount of the bill, deducting the discount, as actual cash, in the same manner as if he had discounted the bill with a third person, and then paid in the amount in bank-notes. The discount makes the bankers complete purchasers of the bill; the transaction was completed; they had no lien, but the thing itself; the bill was as much theirs as any chattel they possessed. This very distinction was taken in the case cited; for it was there said, "If the banker discount the bill, or advance money upon the credit of it, that alters the case;

“ case ; he then acquires the entire property in it, or
 “ has a lien on it pro tanto for his advance.”

Verdict for the plaintiff.

Garrow, S. G. and *Abbott*, for the plaintiff.

Park for the defendant.

[Attornies, *Dennetts* and *Stratton*.]

Vide Bent v. Puller, 5 T. R. 494. *Bolton v. Puller*, 1 Bof. & Pull. 539. *Parke v. Elcafon*, 1 East. 544. *Collins v. Martin*, 1 Bof. & Pul. 649.

HOURIET AND ANOTHER v. MORRIS.

Friday,
Dec. 18.

THIS was an action by the payees against the maker of several promissory notes, dated at Paris, 26th May 1810, for 5,000 *livres tournois* value received in merchandize.

An action may be maintained here by a neutral on promissory notes given to him by a British subject in an enemy's country for goods sold there.

The plaintiffs have long been manufacturers of watches at *Locle*, near *Neufchatel*, in Switzerland. Their custom has been to go once a year to Paris, and to reside about a month in that metropolis, for the purpose of disposing of their commodities. Being there on their annual visit in May 1810, they sold watches to the defendant, a British subject, for the value of which the notes in question were given.

1812.

HOUBERT
and another
v.
MORRIS.

Garrow, S. G. for the defendant, insisted that under these circumstances the action could not be maintained. Here was a trading in an enemy's country, and no contract arising out of it could be enforced in our courts of justice.

LORD ELLENBOROUGH.—The contracting parties were not alien enemies, and it does not follow that the contract was void, though made in an enemy's country. The plaintiffs, who are domiciled in Switzerland, might lawfully sell their goods in Paris, and it is not proved that the defendant, who is a British subject, purchased them there for any illegal purpose.

In an action on a promissory note made and dated in a foreign country, the declaration, without noticing that circumstance, may allege that it was made in the county in which the venue is laid.

Campbell, on the same side, then objected that there was a fatal variance, the declaration having stated that the notes were made in *London*, whereas in fact they appeared on the face of them to have been made at *Paris*. In declaring in foreign bills, the constant course is, to state that they were drawn at the place where they bear date, adding the venue under a *vide licet* (a); and in *Robert v. Harnage*, 2 Ld. R. 1043. 6 Mod. 228. S. C. it was held fatal to state that a bond, dated at Fort St. David's in the East Indies, was made in London, and that the declaration should have alleged that the defendant, "*apud Fort St. David's in the East Indies, viz. apud London in parochia Beatae Mariæ de Arcubus, &c. per scriptum, &c.*"

LORD ELLENBOROUGH.—The contract evidenced by a promissory note is transitory, and the place where

(a.) Bayley on Bills 175.—3d ed.

it purports to be made is immaterial. I see no reason why you may not state that the note was made in the parish of St. Mary-le-Bow, in the ward of Cheap, though dated at Paris,—in the same manner as if it had been dated at York.

1812.
HOURIET
and another .
v.
MORRIE.

Verdict for the plaintiff, according to the rate of exchange at the commencement of the action,

Topping and Du Bois, for the plaintiff.

Garrow, S. G. and Campbell, for the defendant,

[Attornies, *Gregson & Co.* and *Hurd*.]

Promissory notes made abroad do not seem entitled to the aid of 3 & 4 Ann. c. 9. See *Carr v. Shaw*, Bayley on Bills, 18. n.

PRITT and Others v. FAIRCLOUGH and Others.

Friday, Dec. 18,

THIS was an action for not accounting for goods sent out by the plaintiffs from London, to be sold on commission by the defendants in the West Indies.

Where the defendants had acknowledged they had received a letter of a particular date from the plaintiff, which upon notice they did not produce at the trial;—*held*, that an entry by a deceased clerk of the plaintiff in

A notice was served upon the defendants to produce all the letters written to them by the plaintiffs; and a letter was given in evidence, written to the plaintiffs by the defendants, in which they acknowledge the

a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was admissible evidence of the contents of the letter, on proof that according to the plaintiff's course of business the letters which he wrote were copied by this clerk, and then sent off by the post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found correct.

receipt

1812.

PRITT
and others,
v.
FAIRCLOUGH
and others.

receipt of a letter from the plaintiffs, dated 18th December 1807. This letter, which was alleged to contain a copy of the invoice of the goods, together with directions for selling them, being called for, was not produced.

The plaintiffs then proposed to give secondary evidence of its contents; and with this view called one of their clerks, who swore that when this letter was written, and a considerable time before and after, one *Forbes*, now deceased, was entering clerk in their house; the constant course of business was, for the senior partner to write all the letters; they were then handed over to *Forbes*, who copied them in the letter book, and immediately after sent them off by the post; the witness had frequently compared the copies so taken with the originals, and always found them correct. In the book which was produced there appeared entered in the hand-writing of *Forbes* what professed to be a copy of a letter from the plaintiffs to the defendants, dated 18th December 1807; the witness never saw the original; but he had no doubt, from the course of business, that an original letter, of the same tenor with the copy, had been written by the senior partner of the house, and regularly forwarded to the defendants the day it bore date.—The question was, Whether the entry in the letter-book in the hand-writing of *Forbes* could, under these circumstances, be read to prove the contents of the letter?

Scarlett, for the defendants, insisted that the entry was no evidence without previous proof that a letter,
of

of which it was a correct copy, had been written and regularly sent off by the post.

1812.

PRITT
and others

FAIRCLOUGH
and others.

LORD ELLENBOROUGH.—The rules of evidence must expand according to the exigencies of society. I remember the innovation of receiving evidence of the hand-writing of attesting witnesses abroad to prove the execution of deeds. This entry, I think, is reasonable evidence to prove the contents of the letter of 18th December 1807, which the defendants acknowledge they received, and which they do not produce upon a notice for that purpose. We know that it is the habit of merchants to keep such a book; and a witness has sworn that the book in question was kept with great punctuality. Therefore, if the entry in *Forbes's* hand-writing were not admitted, there would be no way in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. I will therefore allow the entry to be read as *prima facie* evidence, and the defendants may rebut it by producing the original.

The plaintiffs had a verdict.

Garrow, S. G. and Marryat, for the plaintiffs.

Scarlett for the defendants.

[Attornies, Gale & Son and Windle.]

In *Price v. Lord Torrington*, every night to the clerk of the
Salk. 285. which was an action brew-house, and giving him an
 for beer sold and delivered, it account of the beer they had
 appearing that the draymen delivered out, which he set down
 were in the habit of coming in a book kept for that purpose,
 to

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PRITT
and others
v.
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and others.

to which they set their hands; on proof that a particular drayman was dead, an entry in this book signed by him was held good evidence of a delivery to charge the defendant. So in an action on a tailor's bill, "a shop book was allowed for evidence, it being proved that the servant that writ the book was dead, and this was his hand, and he accustomed to make the entries." Pitman v. Maddox, Salk. 690. But the entry of a deceased servant is not admissible, without evidence of his usual course of dealing and his general punctuality. Clerk v. Bedford, Bul. N. P. 282. *Vide* Doe v. Robson, 15 East, 32. Hagedorn v. Reid, 10ft.

Friday, Dec. 18. WATKINS and Another, Assignees of BOWDLER 2
Bankrupt v. MAUND.

If a commission of bankrupt has passed the great seal, although it never be opened or acted upon, it has *issued* within the meaning of 49 Geo. 3. c. 121. 4. 2. so as to be notice of a prior act of bankruptcy, and to deprive any party who has received payments from the bankrupt after an act of bankruptcy and more than two months before the suing forth of the effective commission, of the benefit of 46 Geo. 3. c. 135. s. 1.

THIS was an action to recover the sum of £624. paid by the bankrupt to the defendant after an act of bankruptcy.

The defence was, that the payment had been made more than two calendar months before the date of the commission, so as to be protected by 46 Geo. 3. c. 135. s. 1.

To rebut this, the plaintiffs put in two commissions, which had issued against the bankrupt prior to the payment and act of bankruptcy, and which had been superseded without being opened.

Garrow, S. G., insisted that these commissions were no notice to the defendant of the bankrupt having committed

committed an act of bankruptcy or being insolvent. They had remained in the attorney's bag till they were superseded; they had never been acted upon; no advertisement had been published in the Gazette, or any other newspaper, respecting them; and probably no one knew of their existence but the petitioning creditor and the persons officially employed in making them out. Stat. 49 Geo. 3. c. 121. s. 2. provides that the *issuing* of a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed notice. But *issuing* cannot mean merely passing the Great Seal. This is a matter of as great secrecy as striking a docket, which was made notice by 46 Geo. 3. c. 135.; and the 49 Geo. 3. c. 121. recites in the preamble, that the aforesaid provision had not been attended with the good effects which were expected therefrom. The intention of the legislature therefore must have been, to substitute something of which men might be cognizant with reasonable diligence. A commission issued must mean, a commission opened and acted upon, though afterwards superseded.

LORD ELLENBOROUGH.—I must consider that a commission of bankrupt has *issued* when it is delivered out under the Great Seal; and the act expressly says, that the issuing of a commission of bankrupt shall be deemed notice of an act of bankruptcy proved to have been committed at the time of issuing such commission. The issuing of the commission was properly substituted for something still more loose, viz. the striking of a docket. The defendant must therefore be conclusively taken to have known of the prior act of bankruptcy at the time of the payment; and being thus

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WATKINS
and another,
Assignees of
BOWDLER
a Bankrupt,
v.
MAUND.

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WATKINS
and another,
Assignees of
BOWDIER
Bankrupt,
v.
MAUND.

thus deprived of the benefit of these statutes, he cannot retain the money which he then received.

Verdict for the plaintiff.

Park and Littledale for the plaintiff.

Garrow and Lawes for the defendant.

[Attornies, *Harley and Hellyer*.]

As to what shall be notice of *insolvency* where there has been no prior commission, see *Anonymous*, 1 Campb. 492. n.

Wednesday,
Dec. 23.

WM. SPENCER v. BILLING.

If there be one
invariable mode
in which bills of
exchange are
drawn between
particular parties,
this may be
proved by parol
evidence, without
any of the bills
being produced.

THIS was an action of trespass to try the validity of a commission of bankrupt sued out against the plaintiff jointly with his brother *James*, which was impeached on two grounds; 1st, that there had been no partnership between the brothers; and 2dly, that William the plaintiff had committed no act of bankruptcy. *James* carried on business in Manchester under the firm of *James Spencer & Co*; and *William* under that of *Spencer & Co* in Cateaton Street in the city of London.

To prove the partnership, a circumstance mainly relied upon by the defendant was, that the plaintiff or his clerk had been in the habit of accepting bills drawn upon

upon *James Spencer & Co.* and addressed to the house in Cateaton Street, where he carried on his business. Without any of these bills being produced, a witness was asked, Whether the plaintiff had been in the habit of accepting bills so drawn and addressed.

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W. SPENCER
v.
BILLING.

Lord ELLENBOROUGH, interposing, desired the witness to state, whether there was one invariable course of dealing between the parties to these bills, according to which they were drawn and accepted. The witness answered, that there was, and that they were always in the same form.

Garrow, S. G. for the plaintiff still insisted that no examination concerning these bills ought to be permitted unless they were produced. The answers of the witness could only amount to parol evidence of the contents of a written document.

Lord ELLENBOROUGH.—I am clearly of opinion that parol evidence may be received of one invariable mode of dealing between parties by means of bills of exchange. If the mode of dealing varies, the bills must be produced; otherwise, we should be receiving parol evidence of an individual written instrument, which is not permitted. But where bills are sworn to be always drawn and accepted in the same form, I think the course of dealing so established may be proved by the parol examination of a witness, for the purpose of shewing in what relation the parties stood to each other.

1812.

W. SPENCER
v.

BILLING.

Where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his own home without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them left the house of business there to avoid an arrest, at the same time carrying their books of account along with them, —*held*, that they both thereby committed an act of bankruptcy.

With respect to the act of bankruptcy, it was sworn that the plaintiff having been travelling on business in the north of England, went to Manchester in September, and for two days stayed at his brother's lodgings, and occasionally visited the counting-house in which his brother carried on business. At the end of that time, both brothers being afraid of being arrested by a creditor, set off privately in a post-chaise to Halifax in Yorkshire, and carried all the books of *James Spencer & Co.* along with them.

Garrow, S. G. objected that this was no act of bankruptcy in the plaintiff *William*, as his dwelling-house and house of business were both in London, from which he had not absented himself with a view to delay his creditors.

Lord ELLENBOROUGH.—The partnership being established, the counting-house at Manchester must be considered the counting-house of *William* as much as of *James*. The going to Halifax in the manner described was certainly an act of bankruptcy in both, not less according to the language of the statutes, than the etymology of the word;—it was a breaking up of the bank.

Verdict for the plaintiff.

Garrow, S. G. *Park*, and *Campbell*, for the plaintiff.

Topping, *Scarlett*, and *Richardson* for the defendant.

[Attornies, *Nind* and *Milne*.]

Vide *Robertson v. Liddell*, 9 East, 487.

HUBBARD

HUBBARD v. GLOVER.

Thursday,
Dec. 24.

THIS was an action on a policy of insurance on the ship Alexander, at and from Petersburg or Cronstadt to London, at a premium of 20 guineas per cent. to return 10 for arrival.

The policy was subscribed by the defendant on the 13th of June 1811. Before subscribing it, he wished a warranty to be introduced, that the ship should sail before the first of August; upon which the broker observed, "There is no occasion for that; the ship has failed some time, and must now be at Gottenburgh. *There is a cargo ready for her; and she is sure to be an early ship.*"

In effecting a policy of insurance from Russia to this country while the ship was on the outward voyage, the broker represented to the underwriters that a cargo was ready for her, and she was sure to be an early ship.—Held, that this amounted only to a representation of what was expected on the part of the assured, and that the underwriters were liable, although from the delay in beginning to load the cargo, the voyage home was turned from a summer to a winter risk.

In point of fact she had reached Gottenburgh some days before this conversation, and she performed her voyage to Cronstadt without any accident or delay. The captain from his arrival there was ready to take the cargo on board; but the first part of it was not sent along side till the 8th of September. On the 30th of the same month the ship failed on the homeward voyage, and after lying some time for convoy at Matwick, was wrecked on the 11th of November off the coast of Denmark. Before she failed from Cronstadt the winter risk had begun, and the current premium had risen to 30 guineas to return 10.

1812.

HUBBARD
v.
GLOVER.

Scarlett, for the defendant, contended, that under these circumstances the underwriters were not liable. The broker had represented that there was a cargo ready for the ship. This he did not state as matter of expectation or belief; but he directly and positively asserted it as a fact within his own knowledge, or that of his employer. Therefore, the only thing to be considered is, the materiality of the representation; and there can be no doubt that it was most material. If the cargo had been ready for the ship upon her arrival at Cronstadt, in all probability she would have returned in safety. Upon the representation made, the underwriters contemplated a summer risk, and were contented to receive the summer premium; but by the representation being falsified, a winter risk was attempted to be thrown upon them, and the loss had arisen which the assured now sought to recover.

Lord ELLENBOROUGH.—Had the desired warranty been introduced into the policy, that would have been falsified, and the underwriters would have been discharged. But I find no representation here upon the falsity of which they can defend themselves. The broker said, the ship had sailed some time, and must then have reached Gottenburgh; that a cargo was provided for her; and that she must be an early ship. Of these circumstances, only the first could be considered as within his own knowledge; and that was true. The next was likewise true, although only matter of probable conjecture; for the ship had reached Gottenburgh some days before. He said in unqualified terms that a cargo was ready; but this from its very nature was only the subject of expectation

tion and belief. Neither he nor his principal could be supposed to have been at Cronstadt or Petersburg to see the cargo in a warehouse or on the wharf there; and I believe it is by no means an usual thing to have a cargo of Russia produce prepared for any particular ship before she sails on the outward voyage. All the broker could be understood to mean was, that a cargo had been ordered for the ship in question, and that there was every reason to suppose it would be ready for her by the time of her arrival, so that she might be expected to be an early ship. We have no evidence that this representation does not perfectly accord with the truth. The defendant, instead of insisting upon the warranty, chose to speculate upon probabilities. He erred in his calculation; but that is no reason why he should not pay the loss.

1812.
 HUBBARD
 v.
 GLOVER.

Verdict for the plaintiff.

Garrow, S. G. and *Richardson*, for the plaintiff.

Scarlett and *Campbell* for the defendant.

[Attornies, *Willis* and *Binn*.]

So a representation by the owner of goods insured, as to the time of the ship's sailing, is to be considered as matter of expectation, and if made bonâ fide, does not conclude him. *Bowden v. Vaughan*, 10 East. 415.

Thursday,
Dec. 24.

WAGGETT v. SHAW.

Refusal to certify
for special jury,
on application
made the day
after the trial.

THIS cause was tried here the preceding day before Lord Ellenborough and a special jury, when the plaintiff recovered a verdict.

Scarlett, who led for the plaintiff, now applied that his Lordship would certify under 24 Geo. 2. c. 18. that it was a proper cause to be tried by a special jury.

LORD ELLENBOROUGH.—The statute provides, that “the *judge* before whom the cause is tried (if he sees fit) shall *immediately after the trial* certify in open court under his hand, upon the back of the record, that the same was a cause proper to be tried by a “special jury.” I do not think I have authority to grant such a certificate the day after the trial, and I have always been in the habit of refusing applications so made.

Scarlett and *Barnewall* for the plaintiff.

Garrow, S. G. for the defendant.

[Attornies, *Blunt* and *Bourdillon*.]

But a certificate under 43 Eliz. c. 6. to deprive the plaintiff of costs, the damages being under 40s. may be granted at any time after trial. 3 T. R. 38.—So of a certificate under 7 Jac. 1. c. 5. to entitle the defendant to double costs. 7 T. R. 448.—The same of a certificate

under 22 & 23 Car. 2. c. 9. that a battery was proved, or that the title of the land came in question. 11 Mod. 198.—And the like as to a certificate under 8 & 9 W. 3. c. 11. that the trespass was wilful and malicious. 6 T. R. 12. 7 T. R. 449.

M^cBRAIN

M^rBRAIN *v.* FORTUNE and another.

THIS was an action to recover the value of a cargo of fish, alledged to have been sold by the plaintiff to the defendants.

In an action for goods sold, a person who entered into a contract for the purchase of the goods in his own name, is not a competent witness to prove that he purchased them as the agent of the defendant.

The goods were in fact purchased by one *Summers* in his own name; but the plaintiff contended that *Summers* in this transaction was the mere agent of the defendants, and entered into the contract on their account and by their orders.—The sale to *Summers* in his own name being proved, it was proposed to call him as a witness to establish the agency.

Park for the defendant objected, that the witness was incompetent, as he was himself *prima facie* liable, and he would be discharged if the plaintiff recovered in this action.

Garrow, S. G. contra, contended that the witness ought to be received, *first*, on the ground of necessity; and *secondly*, because he would have a remedy over against the defendants, if he should afterwards be sued as their agent; and they might maintain an action against him if he exceeded his authority. This is the common case of a broker, who is called to prove the contract.

Lord ELLENBOROUGH.—I do not think *Summers* can be examined, either on the ground that he is a necessary witness, or that he stands indifferent between

1812.
M^r BRAIN
 v.
FORTUNE
 and another.

the parties. If he was the agent of the defendants, there is no reason why this circumstance may not be proved by other evidence. . Then he has a clear interest, without any counterbalance, in the event of this action. If it succeeds, the verdict would be evidence for him in an action against himself, to which he is *prima facie* liable. The remedy which it is supposed he would have against the defendants if he were sued upon this contract, cannot be thought to render it a matter of indifference to him whether the plaintiff shall succeed in this action or be driven to sue him as the real purchaser of the goods. He is not in the situation of a broker ; for the broker buys and sells in the name of his principal, and has no personal liability to be discharged by the effect of his evidence.

Plaintiff nonsuited.

Garrow, S.G. and *Marryat* for the plaintiff.

Park, for the defendant.

[Attornies, *Rivington* and *Nettleship*.]

Vide *Wright v. Wardle*, 2 Campb. 200.

COURT OF COMMON PLEAS.

HAIGH and Others, Assignees, &c. of LAZARUS & COHEN Bankrupts, v. DE LA COUR. Monday,
Nov. 2.

THIS was an action on a policy of insurance on goods valued at £5,000. on board the Maria at and from London to Pernambuco.

If goods are fraudulently over-valued in a policy of insurance with intent to cheat the underwriters, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board.

In this case the defendant had signed an adjustment, on invoices and bills of lading being produced to him which had been furnished by the assured, representing that goods above the value of £5,000. had been shipped by them on board the Maria. These invoices were now proved to have been fictitious, and the bills of lading to have been interpolated after they were signed by the captain. In fact, goods were shipped by the bankrupts to the value of £1,400. and no more. The ship was afterwards run away with and carried to the West Indies, where the cargo was disposed of by a person whom the bankrupts put on board in quality of supercargo.

'Shepherd, Serjt., for the plaintiffs, allowed they could not recover to the full amount of the valuation in the policy; but insisted that as there were some goods on board belonging to the bankrupts, the assignees had a right to a verdict *pro tanto*. This could only be looked upon as a case of short interest.

1812.

HAIGH and
others, Af-
fignees, &c.
of **LAZARUS**
and **COHEN**,
Bankrupts,

v.
DE LA COUR.

Sir JAMES MANSFIELD, C. J.—If the bankrupts intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract.

—Plaintiffs nonsuited.

*Shepherd and Best, Serjts., and Copley, for the plain-
tiffs,*

*Lens and Vaughan, Serjts., and Campbell, for de-
fendant.*

[Attornies, *Blunt* and *Annistey.*]

ADJOURNED SITTINGS IN K.B. AT GUILDHALL,

Before Hilary Term,

53 GEORGE III.

Monday,
Jan. 18.

JOSEPH and Others v. KNOX.

A person who ships goods in an English port, as the agent of the owner of the goods resident abroad, and pays the freight for them, may maintain an action in his own name for not delivering them according to the bill of lading.

THIS was an action against the owner of a ship on a bill of lading signed by the master, for not carrying goods from London to Surinam.

The bill of lading stated that the goods were shipped by the plaintiffs; that they were to be delivered in Surinam to *Levy Davids* or his assigns; and that the freight was paid in London.

The

The goods consisted chiefly of butter, which the plaintiffs had received from *Suffman & Polack* of Amsterdam, to be forwarded to *Levy Davids* in Surinam, and which in an answer to a bill in equity they swore they believed to be ~~his~~ property.

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Topping, for the defendant, insisted, that this action could not be maintained by *Joseph & Co.*, who had no interest in the goods. They were merely the conduit through which the goods were to be transmitted from *Suffman & Polack* at Amsterdam to *Levy Davids* at Surinam. The property being in *Levy Davids*, he alone was injured by the non-delivery of the goods, and he alone could sue to recover their value. It has often been decided that an action against a common carrier for the loss of goods must be brought by the purchaser who ought to receive them, and not by the vendor who has delivered them to the carrier (a). There, the vendor delivers them merely as the agent of the purchaser, and on that ground can maintain no action respecting them. What difference can it make that here the goods were to be conveyed on board a ship? The plaintiffs were still merely the agents of the real owner of the goods.

LORD ELLENBOROUGH.—I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid

(a) *Dawes v. Peck*, 8 T. R. 330. *Dutton v. Solomonson*, 3 Bof. & Pul. 584.

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by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shippers they have no interest in the goods and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner (a).

It appeared that the ship in question was in the same fleet mentioned in the case of *Van Omeron v. Dowick*, 2 Campb. 42. and that the goods were sold at Grenada, exactly under the same circumstances.—Lord ELLENBOROUGH again laid down the same doctrine with regard to the authority of the master over the cargo, which was acquiesced in on the part of the defendant, and the plaintiffs had a verdict.

Garrow, *S. G. Park*, and *Taddy*, for the plaintiffs.

Topping and *Campbell* for the defendant.

[Attornies, *Kaye & Co.* and *Michell*.]

(a) But where the freight is not paid by the shipper, and the goods are stated in the bill of lading to be shipped by order and on account of the consignee, the action can only be maintained by the latter, *Brown v. Hodgson*, 2 Camb. 36.

SMITH v. WOOD.

Wednesday,
Jan. 20.

THIS was an action for a libel upon the plaintiff in the shape of a caricature print entitled, "The inside of a parish workhouse with all abuses reformed."

A person who having a copy of a libellous caricature, shews it to another on being requested so to do, is not thereby liable to an action for maliciously publishing it.

A witness stated, that having heard the defendant had a copy of this print, he went to his house and requested liberty to see it. The defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed.

Lord ELLENBOROUGH ruled that this was not sufficient evidence of publication to support the action—
And

The plaintiff was nonsuited.

Best, Serjt., *Park*, and *Campbell*, for the plaintiff.

Garrow and *Marryat* for the defendant.

[Attornies, *Parton* and *Stratton*.]

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Hilary Term,

53 GEORGE III.

FIRST SITTINGS AFTER TERM AT
WESTMINSTER.

Saturday,
Feb. 13.

MAYOR and Others v. JOHNSON and EATON.

A traveller received a bank note in a provincial town, which he cut in two, and sent the halves on different days by the post, addressed to his employers in London; one of these was stolen from the mail coach, and they received the other.—*Held*, that under these circumstances, they could not maintain an action against the makers of the note on producing that half of it which reached them safely.

THE plaintiffs declared in the usual form as bearers, against the defendants as makers, of a £5. promissory note of the Stamford and Rutland bank, payable at Stamford, or at Messrs. Ramsbottom, Newman, Ramsbottom, & Co.'s, bankers, London.

The plaintiffs carry on business in London. The note in question was received at Nottingham on their account by their traveller. According to his usual mode of proceeding on such occasions, he cut it into two parts. The one he put into the post-office at Nottingham, inclosed in a letter for the plaintiffs, on the

26th

26th of October last. This never reached them, the bag containing it having been stolen from the Leeds mail. The other half, which was sent from Nottingham on the 28th, they duly received and presented for payment at Ramsbottom & Co.'s, who refused to pay it without orders from the defendants. The defendants being written to on the subject, pronounced the application impertinent.—The latter half of the note produced at the trial was in the following form :

Rutland Bank No. A. 524.
pay the Bearer Five Pounds
Bank at Stamford or at
Newman, Ramsbottom & Co.
received 3d Sept. 1810.

Wm. Johnson & Stephen Eaton.
Stephen Eaton.

The handwriting of the defendant *Eaton* was proved to the note ; the traveller who received it at Nottingham stated the manner in which he had divided it and put the two parts into the post-office there ; and a clerk from the General Post Office in Lombard Street swore that the Nottingham bag of the 26th October, on account of the robbery of the Leeds mail, had not arrived in London. It was alleged that a sufficient indemnity had been offered by the plaintiffs to the defendants before the commencement of the action ; but of this no evidence was given, and it was not considered material.

LORD ELLENBOROUGH.—I am of opinion that this action cannot be maintained. It is usual and proper to pay upon an indemnity ; but payment can be enforced at law only by the production of an entire note,

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JOHNSON
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and EATON.

or by proof that the instrument, or the part of it which is wanting, has been actually destroyed. The half of this note taken from the Leeds mail may have immediately got into the hands of a *bonâ fide* holder for value, and he would have as good a right of suit upon that as the plaintiffs upon the other half which afterwards reached them. But the maker of a promissory note cannot be liable in respect of it to two parties at the same time.

Plaintiffs nonsuited.

Garrow, S. G. & ——— for the plaintiffs.

Park for the defendants.

[Attornies, *Bickerton* and *Anglic.*]

• *Vide* *Pierfon v. Hutchinson*, 2 Campb. 211.

Saturday,
Feb. 13.

SHEPHERD Gent. one, &c. v. MACKOUL.

If a husband turns his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose.

Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence; — held, that he was liable to an attorney, whom she employed to defend her, and by whom he knew that she was defended.

THIS was an action on an attorney's bill for business done on the retainer of the defendant's wife. The first part of the bill was for assisting her to exhibit articles of the peace against her husband; and the second for defending her upon an indictment for keeping a bawdy-house.

It appeared that the defendant without just cause had turned his wife out of doors with circumstances of great violence, and that she exhibited articles of the peace against him prepared by the plaintiff; that she afterwards kept a house of the description above mentioned; that the defendant was privy to her doing so; that she was indicted for it, and that he knew she was defended by the plaintiff.

Lord

LORD ELLENBOROUGH.—The defendant's liability for the first part of the charge will depend upon the necessity for exhibiting articles of the peace against him. If that proceeding was uncalled for, his wife certainly could not make him liable for the expence thereby incurred. But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might therefore charge her husband for the necessary expence of this proceeding as much as for necessary food or raiment.—With respect to the defence upon the indictment, as the defendant knew and approved of the business his wife carried on, and was aware of the prosecution, without expressing any dissent to the plaintiff's defending her, I think a promise may be fairly inferred on the part of the defendant to pay the plaintiff for his labour in conducting the defence.

The plaintiff had a verdict for his whole demand.

Garrow, S. G. and Reader for the plaintiff.

Topping for the defendant.

[Attornies, *Shepherd and Kifs.*]

Wherever the husband causelessly turns away his wife, he is liable for necessaries supplied to her. *Thompson v. Harvey*, 4 Burr. 2177. *Aliter*, if he does so for just cause. *Ham v. Toovey*, Selw. N. P. 290. 2d edit.

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&c.
v.
MACKOUL.

Saturday,
Feb. 13.

CLARKE v. BROUGHTON.

Although it may be a defence to an action for penalties on 5 Ann. c. 14. that the defendant joined in the sport as servant to another, he must give strict evidence that the person by whose orders he acted was himself qualified to kill game.

ACTION on 5 Ann. c. 14. for keeping and using a dog and a gun for the destruction of game.

The defendant, who is a farmer, being in company with one *Boycott* on the occasion in question, both having guns in their hands, the latter shot a hare, which the former picked up.

Garrew, S. G., for the* defendant, relying upon *Rex v. Taylor*, 15 East, 460. stated from his instructions, he should prove that his client upon this occasion had gone out to shoot some crows, for the purpose of hanging them up in a field lately sown with beans; that he accidentally met with *Boycott*, a qualified sportsman; that soon after the hare got up, which *Boycott* shot, and that the defendant picked it up by *Boycott's* express orders.

Lord ELLENBOROUGH said, these facts, though not very probable, if satisfactorily made out, might amount to a defence. He therefore allowed the witnesses to be called.—It turning out, however, that *Boycott* could not be satisfactorily proved to have any qualification to kill game himself, Lord ELLENBOROUGH clearly held, that the defendant could not justify as his servant.—
And

The plaintiff had a verdict for one penalty.

Topping

Topping and King for the plaintiff.

Garrow, S. G., for the defendant.

[Attorneys; *Ayton and Denton.*]

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CLARKE
v.
BROUGHTON.

Vide Lewis v. Taylor, K. B. T. 52 Geo. 3. 16 East. 49.

FIRST SITTINGS AFTER TERM AT GUILDHALL.

HUTCHINSON v. REID.

Monday,
Feb. 15.

THIS was an action of assumpsit for not accepting a bill of exchange for the price of three puncheons of rum sold by the plaintiff to the defendant on the 2d December 1812, to be paid by bill at two months. The declaration likewise contained counts for goods sold and delivered. The action was commenced on the first day of Hilary term last.

Where goods are sold, to be paid for by a bill of exchange at a given date, to an action commenced within that time for refusing to give such bill, the defendant cannot set off a debt due to him from the plaintiff.

The defendant pleaded the General Issue, and gave a notice of set-off for goods sold and delivered.

It was proved that the rum had been sold to the defendant on the terms stated in the declaration; and that he afterwards refused to accept a bill for the price, which amounted to £97., saying, the plaintiff should have credit for it in account. It likewise appeared that

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v.
 REID.

at that time, the plaintiff owed the defendant a sum of about £300. for goods sold; and the question was, whether this could be set off against the plaintiff's demand in the present action.

Park, for the defendant, contended that it might. What the plaintiff sought to recover was, the price of the rum he had sold to the defendant. That was a liquidated debt amounting exactly to £97. Though not sought to be recovered under the count for goods sold and delivered, its amount was ascertained with equal precision. In fact, the cross demands were exactly of the same nature, and it would be monstrous injustice if the one could not be set off against the other.

LORD ELLENBOROUGH.—Had this action been commenced after the two months had expired, I think the set-off must have been permitted. But on the first day of last Hilary term, there was no debt actually due to the plaintiff. How can I say then that this is a case of mutual debts, which may be set off against each other? The action is not brought for a debt, but for a refusal to do a collateral act. The plaintiff was entitled to a bill of exchange for £97. as soon as he had delivered the rum; and it is for refusing to give him one that the defendant is now sued. The plaintiff's demand therefore is for unliquidated damages, to which a set-off is wholly inapplicable. If the defendant wished to reserve a power of settling for the rum in account, he should have taken care not to stipulate to pay by a bill of exchange.

The plaintiff had a verdict for £97.

Garrow,

Garrow, S. G., and Richardson, for the plaintiff.

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Park for the defendant..

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[Attornies, *Sherwood and Siggers.*]

Vide Mussen v. Price, 4 East. 147. Dutton v. Solomonson,
3 Bof. & Pul. 582.

ADJOURNED SITTINGS AT WESTMINSTER.

GODARD and Another v. BENJAMIN, Gent. one, &c.

Thursday,
Feb. 18.

THIS was an action for goods sold and delivered.

The plaintiffs' original demand was £4. 11s. which they admitted had been paid to them by the defendant on the 24th day of December last; and the only question was, whether this payment was to be considered as made before or after the commencement of the action.

In an action against an attorney for goods sold, the plaintiff proved that he filed his bill at half past eleven in the forenoon of 24th Dec. and the defendant gave in evidence a receipt for the sum demanded, dated the same day.—*Held*, that this was no answer to the action, without proof that the payment was made before filing of the bill.

The plaintiffs proved, that they filed their bill against the defendant on the 24th day of December at half past eleven in the forenoon; but there was no evidence whatever of the time when notice of the bill being filed was served upon the defendant.—On the other hand, the defendant put in a receipt signed by

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 and another
 v.
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 Gent. one,
 &c.

the plaintiffs' agent for the £4. 11s. dated 24th Dec. without shewing at what hour of the day the money had been paid.—The action was continued because the defendant refused to pay the costs of the bill.

Garrow, S. G., for the plaintiffs, contended, they had a right to proceed for their costs, as the action was commenced from the moment the bill was put upon the file in the King's Bench Office, and the defendant had not shewn the debt to have been previously satisfied.

Scarlett, *contra*, denied that the action was commenced till the defendant had notice of the filing of the bill regularly served upon him. The bill remained upon the file a mere dead letter during such time as the defendant was not called upon to answer it. There was no evidence here that the defendant had notice of the bill during any part of the 24th, and on that day he had certainly paid the debt.—But even if the filing of the bill was the commencement of the action, the debt had been paid the same day the action was commenced, and the Court might presume that the debt was paid before the bill was filed.

LORD ELLENBOROUGH.—I am clearly of opinion that the filing of a bill is the commencement of an action against an attorney; without notice being served upon him. It follows, therefore, that this action was commenced on the 24th of December at half past eleven in the forenoon. Why am I to presume that the debt was previously satisfied? If the fact was so, the defendant might have shewn it by calling the plain-

tiffs' agent who received the money. Is it not as probable, that he made the payment after knowing that the bill was filed? At any rate, the *onus* lay upon him to prove payment before action brought.

Verdict for the plaintiffs, with nominal damages.

Garrow, S. G., and *Comyn*, for the plaintiffs.

Scarlett, for the defendant.

[Attornies, *Turville* and *Benjamin*.]

Vide *Toms v. Powell*, 7 East. 536.

ANSLEY v. BIRCH.

Thursday,
Feb. 13.

GARROW, S. G., for the plaintiff, applied that the trial of this cause might be put off for two days, on an affidavit stating, that a witness had been suddenly taken ill the preceding night; but was likely to be able to attend on the following Saturday.

At Nisi Prius in K. B. the plaintiff cannot apply to put off the trial of his cause from Sittings to Sittings, but may from one day in the Sittings to another.

Marryat, on the other side, contended, that an application to put off a trial was never listened to when made on the part of the plaintiff, who having a controul over his own record, has only to withdraw it if he finds he is not prepared to try the cause.

LORD ELLENBOROUGH.—Where the trial is to be put off beyond the present sittings, such is the rule I have observed. The plaintiff in that case must with-

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draw his record. Much valuable time is thus saved, which would be wasted in these applications. Nor is there any great hardship imposed upon the plaintiff; for even if I were to make an order to put off the trial, he must pay costs to the defendant; and, either way, he can bring on his cause again for trial with equal facility. But where, from the sudden indisposition of a witness, who may be able again to attend in the course of a day or two, or for any temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe he shall be able to try it before the sittings are over, it would be too much to make him withdraw his record; and I think a Judge at Nisi Prius ought to make an order for the trial to stand over till such time as the witness is likely to attend.—Let the trial of this cause be postponed to the day mentioned by the Solicitor General.

Friday,
Feb. 19.

ROBINS v. GIBSON.

Where a bill is drawn upon funds which there is reasonable ground to expect will reach the hands of the drawee before it becomes due; although they do not, the drawer is entitled to notice of its dishonor.

THIS was an action against the drawer of a bill of exchange, dated at Buenos Ayres, 13th September 1812.

To excuse the want of notice the drawee was called and stated, that he had no funds of the drawer in his hands between the time when the bill was presented for acceptance and its becoming due; but he admitted,

Where the drawer of a foreign bill of exchange happens to be in England when it becomes due and is dishonored, it is enough for the purpose of charging him, to have the bill protested, and to give him notice of the fact of its dishonor, without communicating the protest to him, or sending a copy of it to the place where the bill was drawn.

ON

on cross-examination, that he had notice before the bill was first presented, that it was drawn on a cargo of indigo and hides shipped from Buenos Ayres by the drawer; that the cargo was at that time in the hands of a broker for sale; that one *Whitby* was to pay over the proceeds to answer the bill; that before the bill was presented for payment the hides had been sold and a loss had arisen on them; but the indigo was not sold; and that without applying to *Whitby* on the subject, he had refused payment as not having funds.

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Lord ELLENBOROUGH ruled; that the bill having been drawn on expected funds, it was necessary to prove notice of its dishonour (a).

The plaintiff then proved that a protest was regularly drawn up; and read a letter from the defendant, dated 1st September 1812, giving the drawee notice of the bill drawn upon him, and saying that he was going to Rio Grande, and when he returned to the Havannah would write again. It was also proved that the drawer arrived in England before the bill was due, and that within the usual time for that purpose a letter was sent to his house, stating that the bill was dishonoured, but not communicating the protest or a copy of it.

Puller, for the defendant, objected, that the plaintiff was bound to shew, either that the protest had been sent out to Buenos Ayres, or that it had been regularly communicated to the defendant in England: This being a foreign bill of exchange, a protest was the

(a) *Rucker v. Hiller ante 217.*

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only notice of its dishonour known by the custom of merchants; and according to the evidence before the jury, no such notice had either been personally conveyed to the defendant, or sent to the place from which the bill was drawn, where he might have been expected to be found.

Lord ELLENBOROUGH was of opinion, that under the circumstances of the case enough had been done.

And the plaintiff had a verdict,

In the ensuing term a rule to shew cause why the verdict should not be set aside and a new trial granted was refused, the Court being of opinion it was sufficient that the bill was protested, and that the defendant had notice of the fact of its dishonour, although the protest was not communicated to him. They observed, that this gave him an opportunity of calling for the protest if he wished to see it.

Garrow, S. G. and Hulton, for the plaintiff,

Fuller for the defendant,

[Attornies, *Stokes and Kibblewhite*.]

Vide Cromwell v. Hynton, 2 Esp. N. P. Cas. 511.

LEE q. t. v. BIRRELL.

Friday,
Feb. 19.

THIS was an action of debt to recover a penalty of £100. for acting as a committee-man of the parish of St. Martin-in-the-Fields, being at the same time a collector of the property tax.

To prove that the defendant was a collector of the property tax at the time in question, the clerk to the commissioners was called, and desired to produce the book containing the defendant's appointment.

The witness refused to produce the book, or to answer any question concerning the defendant's acts as collector, on the ground that before entering upon his office as clerk to the commissioners, they had administered an oath to him, not to disclose any thing he should learn in that capacity respecting the property tax, except with their consent, or by force of an act of parliament,

Notwithstanding the oath administered to a collector of the property tax by the commissioners, that he will not disclose any thing he learns in that capacity, except with their consent, or by virtue of an act of parliament, he is bound, when subpoenaed as a witness, to give evidence of all facts within his knowledge touching the matter in question.

Lord ELLENBOROUGH.—I clearly think the oath contains an implied exception of the evidence to be given in a court of justice in obedience to a writ of subpoena. The witness must produce the book, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him.

The witness had not brought the book along with him; but the plaintiff recovered a verdict (subject to the

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the opinion of the court) upon another count of the declaration, charging the defendant with having acted as a committee-man while he was a collector of the assessed taxes.

Holroyd and Abbott for the plaintiff.

Garrow, S. G. and Richardson for the defendant.

[Attornies, *Wilshen and Finmore.*]

EDDEN v. READ.

A receipt for taxes signed by a clerk of the Deputy Receivers General of a county in their name, may be given in evidence without a stamp.

THIS was an action for money had and received, to recover the sum of £100, alleged to be due from the defendant to the plaintiff under the following circumstances :

The plaintiff was a collector of king's taxes in the parish of *Drayton Bassett*, in the county of Stafford. The defendant was a clerk to *Messrs. Spooner and Attwood*, bankers at Birmingham, and Deputy Receivers General for the county of Stafford. According to the plaintiff's case, on the 3d of August 1809. he paid the defendant the sum of £500 for taxes, and had a receipt from him for that sum. The defendant insisted that the receipt was given for that sum by mistake, and that he only received £400, which was all that was carried to the plaintiff's credit.

On the part of the plaintiff, the receipt was now offered in evidence. It was a printed form filled up, and was signed "*for Spooner and Attwood, WM. READ.*"

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v.
READ.

The receipt being objected to, on the ground that it had no stamp, stat. 48 Geo. 3. c. 141. s. 1. Rule 5. was cited, whereby it is directed, that duties and assessments shall be paid in a given manner to the Receiver General, "for which payments the said Receiver General or his Deputy shall give to such collectors, receipts in writing, and for which receipts no stamp duty shall be charged or chargeable, any statute to the contrary thereof notwithstanding."

N. G. Clarke for the defendant, still insisted, that the receipt was inadmissible without a stamp, as it was given, not by the Receiver General or his Deputy, but by a clerk of *Messrs. Spooner and Attwood*.

LORD ELLENBOROUGH.—*Messrs. Spooner and Attwood* are the deputies of the Receiver general, and the receipt is signed by the defendant as their agent. I therefore think it is given by them as such deputies, within the meaning of the act of parliament, and requires no stamp.

Clarke then objected that the action ought to have been brought against *Spooner and Attwood*, and not the defendant, as upon the evidence the money had been received by them, and he must be taken to have paid over to them the whole sum for which the receipt was given.

A receipt signed by an agent for his principals, is not evidence to support an action for money had and received against him to recover the money back.

Garraw,

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v.

READ.

Garrow, S. G. contra, contended that the £100 for which the plaintiff had not received credit must still be supposed to be in the defendant's hands.

LORD ELLENBOROUGH.—If the objection is taken, I must give effect to it. The only evidence we have of the payment, is the receipt, and that purports that the money was paid to *Spooner and Attwood*. They are the persons liable, therefore, if the sum paid really was £500.

Plaintiff nonsuited.

Garrow, S. G. and Heath for the plaintiff.

N. G. Clarke and Brougham for the defendant.

[Attornies, *Turner and Jennings*.]

Vide Duke of Norfolk v. Worthy, 1 Campb. 337.

Saturday,
Feb. 20.

WHEELER v. BRAMAH and Another, Assignees of
BORMAN, a Bankrupt.

The assignees of a bankrupt having allowed his effects to remain upon the premises occupied by him nearly a twelvemonth after the bank-

ruptcy, for the purpose of preventing a distress paid the arrears of rent due, at the same time intimating to the landlord that they did not mean to take to the lease unless it could be advantageously disposed of: the effects were soon after sold and removed from the premises: the lease was at the same time put up to sale by order of the assignees; but there were no bidders for it: they omitted to return the key to the landlord for near four months after: however, they were not asked for it, and they no otherwise made use of the premises.—*Held*, that they were not, under these circumstances, liable to the landlord as assignees of the lease.

Borman,

Borman, the lessee, was declared a bankrupt 26th June 1810, and the defendants were chosen his assignees on the 18th of August following. He presented a petition to the Lord Chancellor to supersede the commission, which was afterwards dismissed. On the 21st May 1811, the bankrupt's effects still remaining on the premises, the plaintiff threatened to distrain them for three quarters arrears of rent due at the preceding Lady-day. To avoid the distress, Mr. Dixon, one of the defendants, accepted a bill for these arrears, and it was then agreed between him and the plaintiff, that the lease should be put up to sale, to see if it was worth any thing, Dixon stating, that otherwise it was not the intention of the assignees to take to the premises. On the 28th of the same month the bankrupt's effects were sold on the premises, and cleared away by the purchasers. The lease was at the same time put up to sale, by order of the assignees; but there was no bidding for it. The key was not sent by them to the plaintiff till the 21st of September following. However, they never made any other use of the premises. The indenture of lease remained all along in the hands of the bankrupt's attorney, who had a lien on it.

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and another,
Assignees of
BORMAN,
a Bankrupt.

Park, for the plaintiff, contended, that under these circumstances the defendants had made themselves liable as assignees of the term. In *Turner v. Richardson*, it was held, the assignees of a bankrupt were not liable from the mere circumstance of putting the premises up to sale for the purpose of ascertaining whether the lease was of any value. But here the defendants had done a great deal more. By the payment of rent they acknowledged they were liable as the assignees of the

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 BORMAN,
 a Bankrupt.

the term, and if they once took upon themselves that character, they could not afterwards renounce it.— Besides, from the length of time they had kept the plaintiff out of possession, they must be considered as having taken to the premises. The commission was sued out in June 1810, and they made no offer to deliver up the key till the month of September in the following year.

Lord ELLENBOROUGH.—I am of opinion that the defendants have done nothing to render themselves liable as assignees of the lease granted by the plaintiff to the bankrupt. They paid rent, not as tenants, but for the express purpose of preventing a distress, protesting at the same moment, that they did not mean to adopt the term unless, upon a trial being made, it should be found to be valuable. The premises were put up to sale with the plaintiff's concurrence, and it is admitted the defendants had a right to make this experiment without incurring any personal liability to the landlord. The only other circumstance relied upon, is the delay to send the key. Had they refused to deliver it, they would have been subject to an action of some sort at the plaintiff's suit; but the question here is, whether the simple omission to send the key was tantamount to entering and taking possession of the premises. I clearly think that it was not; and that the defendants must be taken to have repudiated the lease as they had a right to do.

Plaintiff nonsuited.

Park and Marryat for the plaintiff.

Garrow, S. G. and Comyn for the defendant.

[Attornies, Langhorn and Edwards.]

 ADJOURNED SITTINGS IN LONDON.

CALVERT v. ROBERTS.

Friday,
Feb. 26.


THIS was an action by the indorsee against the acceptor of a bill of exchange, dated 16th March 1812, drawn by *J. Stroud*, payable to his own order at three months after date.

An accommodation bill payable to the drawer's order cannot be altered after acceptance and an attempt to negotiate it, and before it is actually negotiated.

The bill was accepted by the defendant for *Stroud's* accommodation, and then bore date 10th March. *Stroud* tried to negotiate it as it stood at first, but could not. Several days after, he altered the 10 to 16 and indorsed it away.—The objection being taken that the bill was vitiated by this alteration,—

Park for the plaintiff contended, that an accommodation bill, payable to the drawer's order, may be altered till it is negotiated. While in the hands of the drawer it evidences no contract on which an action can be maintained. A bill for value may be altered before acceptance, and an accommodation acceptance only becomes effectual when the bill is indorsed.

Lord ELLENBOROUGH.—This bill when dated 10th March was a valid and complete instrument, framed
8 according

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according to the intentions of the parties. Therefore the date could not afterwards be altered, even with their consent. The alteration was tantamount to the drawing of a new bill.

Plaintiff nonsuited.

Park and *Gaselee* for the plaintiff.

Garrow, S. G. and *Barrow* for the defendant.

[Attornies, *Jones* and *Barrow*.]

Vide *Cardwell v. Martin*, 9 East. 190. 1 Campb. 79.

Saturday,
 Feb. 27.

REX v. BARNETT.

Q. as to proper title of stat.
 5 Eliz. c. 4. which is stated differently in different editions of the statutes? Where it was set out in an indictment as given by Ruff head, the judge refused to direct an acquittal for a variance, on production of a copy of the act printed by the King's printer, in which it is given differently.

An indictment cannot be maintained on 5 Eliz. c. 4. for exercising a trade without having served an apprenticeship, unless the defendant is proved to have exercised the trade for the space of a month.

THE indictment charged that the defendant after the making of a certain act of parliament made in the parliament of the Sovereign Lady Elizabeth late Queen of England, &c. at a session thereof holden at Westminster, in the county of Middlesex, in the fifth year of the reign of the said late Queen, entitled, "An act containing divers orders for artificers, labourers, servants of husbandry, and apprentices," and after the first day of May then next ensuing, to wit, on, &c. and from thence continually afterwards, until the day of taking that inquisition, to wit, for the space of four months and upwards, at, &c. did unlawfully and for his own lucre and gain, use and exercise the craft, my stery

myſtery, and manual occupation of a printer, the ſame being a craft, myſtery, and manual occupation uſed and exerciſed within the realm of England at the time of making the ſaid act of parliament, the ſaid defendant not having been brought up therein ſeven years at the leaſt as an apprentice, in manner and form as in the ſaid act of parliament is mentioned, contrary to the form of the ſtatute in ſuch caſe made and provided, and againſt the peace, &c.

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Scarlett, for the defendant, objected, that the title of the act of parliament was miſrecited in the indictment, and he produced a copy of the act lately printed by the King's Printer, in which it is entitled, "An act touching divers orders, &c."

Lord ELLENBOROUGH was about to direct an acquittal, when *Ruffhead's* edition of the ſtatutes was produced, in which the title of this act correſponds exactly with that ſet forth in the indictment.

Scarlett ſtill inſiſted that the true title of the act muſt be ſuppoſed to be given in the copy printed by the King's Printer.

Lord ELLENBOROUGH ſaid, that in caſe of a recent ſtatute, he ſhould have acted upon the copy printed by the King's Printer; but with regard to a ſtatute of Queen Elizabeth, he ſhould conſider *Ruffhead* to be correct, till the contrary was proved by an examination of the parliament roll.

It appeared in evidence, that the defendant, who was a Jew old clothefman, within the period of time

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mentioned in the indictment, set up a printing press in his house, and printed a Hebrew almanack ; but there was nothing to shew how long he had been employed in doing so, and the work might have been done in the course of a few days.

Scarlett insisted that the defendant was entitled to an acquittal, as he had not been proved to have exercised the trade for the space of one month. The statute forbids the exercising of a trade without having served an apprenticeship, " upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default, forty shillings for every month." Therefore till the trade had been exercised a month, there was no default, and no penalty was incurred.

Garrow, S. G. contra, contended, that the act was violated, and an indictable offence was committed by exercising the trade in any one instance without having served an apprenticeship ; that a discretionary punishment might be inflicted, as in case of other misdemeanors ; and that even if the punishment were confined to the penalty, that might be apportioned according to the length of time the jury should find the trade had been exercised.

LORD ELLENBOROUGH.—I am of opinion, that until the trade has been illegally exercised for a month, no indictable offence has been committed. The defendant is therefore entitled to a verdict of acquittal.

Garrow,

Garrow, S. G. and *Hart* for the plaintiff.

Scarlett and *Beard* for the defendant.

[Attorneys, *Jones* and *Ihuacs*.]

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Vide *Cunningham v. Watfon ante* 249.

DALE v. BIRCH AND ANOTHER, Sheriffs of London.

THIS was an action for money had and received, to recover the sum of £49, which the defendants had levied under a writ of *fi. facias* at the plaintiff's suit.

After a return to a writ of *fi. fa.* that the money is levied, the sheriff is liable to an action for money had and received, without any demand of payment.

The plaintiff's counsel merely gave in evidence an examined copy of the *fi. fa.* and the defendants' return, stating that they had levied the £49.

Park, on the other side, said this action had been defended to try the question, whether the sheriffs in every case are bound to run in search of the plaintiff to pay him the money levied. He was instructed he should be able to prove in this case, that as soon as the money had been levied and paid into the office, the plaintiff's attorney had notice that he might receive it at any time when he should call or send for it. He refused, however, to do either, and before making any demand of payment vexatiously commenced this action. But if the sheriffs were liable to be harassed with such actions, they might be ruined in performing the duty

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v.

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and another,
Sheriffs of
London.

of their office. How could they tell where the plaintiff was to be found? He might not even be within their bailiwick, but in a distant part of the world. If they were liable to an action after demand of payment once made,—till then, they were to hold the money to answer the exigency of the writ.

LORD ELLENBOROUGH.—Where any vexatious proceedings are instituted against the sheriffs, the court will protect them. Upon the facts stated, I think the court would have stayed this action, and perhaps some application for relief may still be made with effect. But sitting here, I can only consider whether the action in point of law is maintainable, and I make no doubt that it is. Upon the sheriffs' return, the £49 was certainly money had and received by them to the plaintiff's use; and as it had never been tendered to him, he had strictly a right to bring an action to recover it, without any previous demand of payment.

The plaintiff had a verdict; and it was suggested on his behalf, that payment had repeatedly been demanded of the officer who had made the levy before the action was commenced.

Jervis and Campbell for the plaintiff.

Park and Andrews for the defendant.

[Attornies, *Hurd and Isaacs*.]

SMITH AND ANOTHER, Assignees of WILLIAMS, a Bankrupt, v. CURRIE. Monday,
March 1.

THIS was an action of trover against the sheriff of Hertfordshire, for taking the bankrupt's goods in execution, on the 20th of November last; and the question was, whether an act of bankruptcy had been committed before that day.

It appeared that *Williams*, who was a wine and spirit merchant at St. Alban's, owed a sum of money to a carrier of that town. The carrier's collecting clerk had been in the habit of making his rounds between one and two o'clock, which was the time when *Williams* dined. In the month of October *Williams* told his servants that the clerk was extremely troublesome in calling for money at that hour, and desired that he might be denied to him. The clerk called twice afterwards between one and two to demand a debt due to the carrier; *Williams* was in the house both times; but his servants said he was from home. They afterwards told him what they had done, and he did not disapprove of it.—He continued accessible to his other creditors at business hours till after the execution.

A trader who is denied by his own orders to a creditor in the habit of calling upon him to demand a debt when he is at dinner, does not commit an act of bankruptcy, if his intent be to avoid interruption at that hour, and not to delay the creditor, although the creditor be thereby delayed.

Park, for the plaintiff, contended, that the denial to the carrier's clerk was a clear act of bankruptcy in *Williams*, as his creditor was thereby delayed.

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and another,
Assignees of
WILLIAMS
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LORD ELLENBOROUGH.—The question is, whether it was *Williams's* intent to delay a creditor when he ordered himself to be denied. If his object was merely to eat his dinner in peace and quietness, he committed no act of bankruptcy by excluding a creditor while he was so employed. Bankruptcy the law considers a crime, and the intention of the act must be examined. A simple denial to a creditor is not enough to make a trader a bankrupt. He may not only order himself to be denied at unreasonable hours in the night; but in the course of the day when he is taking his meals, and on other occasions which may be easily imagined, he may refuse to see his creditors without meaning to delay them, and therefore without committing an act of bankruptcy, although they should for a time be delayed.

Plaintiffs nonsuited.

Park and Fispinoffe for the plaintiffs.

Garrow, S. G. and Gurney for the defendant.

[Attornies, *Woodhouse* and *Aubrey*.]

Vide Robertson v. Liddell, 9 East. 487. Holroyd v. Gwynne, 2 Taunt. 176.

LA NEUVILLE and Another v. NOURSE and Another. Tuesday, March 2.

THE plaintiffs had sold the defendants ten dozen of Burgundy. In about a twelvemonth after, the defendants applied to have it exchanged for the like quantity of Champagne, a wine then at the same price. The plaintiffs agreed to this, and the exchange took place. When the Burgundy was sent to the defendants, it was of the first quality and in the best condition; but when it was returned, it was found to be quite sour and only fit to be used as vinegar.

This was an action of assumpsit to recover the value of the Champagne, or a compensation for the bad condition of the Burgundy. The declaration contained a great number of special counts, alledging different promises on the part of the defendants, that the wine returned was in good condition; but there was no evidence of any express promise by them upon the subject, or of any representation respecting the condition of the wine.

Lord ELLENBOROUGH said, he was of opinion that without evidence of an express warranty, or of direct fraud, the action could not be supported, and that the maxim of *caveat emptor* applied to this case.

Plaintiff nonsuited.

Garrow, S. G. and Abbott, for the plaintiff.

Park for the Defendant.

[Attornies, *Bovill* and *Hillyard*.]

Vide Parkinson v. Lee, 2 East. 314.

A a 4

READ

Where a customer who had bought a quantity of burgundy of excellent quality from a wine merchant, some time after procured him to exchange a portion of it for wine of a different description; —*held*, that there was no implied warranty on the part of the customer as to the state of the wine at the time of the exchange, and that although it had then become quite sour, the wine merchant had no remedy, without proof that the other knew its deteriorated condition and intended to practice a fraud.

Tuesday,
March 2.

READ v. HUTCHINSON.

Where goods were sold "to be paid for by F.'s bill on P. without recourse on the buyer in case of its not being paid;" although the buyer then knew the bill to be worth nothing, he is not liable to an action of *indebitatus assumpsit* for the value of the goods.

THIS was an action of *indebitatus assumpsit* for goods sold and delivered.

The following is a copy of the sale note :

" 16 Oct. 1812.

" Sold for account of Mr. James Read,

" To John Hutchinson,

" Seven pipes Guernsey red wine, ex Prince Regent, at £47. per pipe, as they lie in the London dock. To be paid for by Mr. Edward's bill on Mr. P. Young of £328. 12 s. due in December next, without recourse on the buyer in case of its not being paid."

The wines were immediately transferred in the London docks to the defendant, and he gave the bill upon Young in payment.

The plaintiff's case was, that this bill was dishonoured when due, and that the defendant at the time of the sale perfectly well knew it was worth nothing, and had deceitfully represented it as an available security. The defendant it was contended was therefore still liable to pay for the goods. *Ex parte Dickson*, 6 T. R. 142. *Ex parte Blackburn*, 10 Ves. Jun. 204. *Owen v. Morse*, 7 T. R. 64. and *Anonymous*, 12 Mod. 517. were referred to as in point,

Lord

Lord ELLENBOROUGH.—I am of opinion this action cannot be maintained. If there be any contract between these parties, it is that evidenced by the broker's note; and according to that, the wines were not to be paid in money, but were to be bartered against a bill of exchange, and it was expressly stipulated, that the buyer was not to be liable in case the bill should be dishonoured. Therefore he never was indebted to the plaintiff for the price of the wines, and the law cannot imply a promise on his part to pay for them. If the contract is altogether rescinded, there is no sale. The defendant is not a purchaser of the goods, but a person who has tortiously got possession of them. If he knew at the time that the bill was worth nothing, I think he is answerable to the plaintiff to the amount of the value of the goods; but this is not the proper remedy. The plaintiff should have brought trover, or an action of deceit.

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 v.
 HUTCHINSON

Plaintiff nonsuited.

Park and *Storks* for the plaintiff.

Garrow for the defendant.

[Attornies, *Suggers* and *Sherwood*.]

Vide *Thompson v. Bond*, 1 Campb. 4.

Wednesday,
March 3.

ANNETT v. CARSTAIRS and Another.

Where a ship is mortgaged, but the mortgagor continues in possession, the master employed by him cannot maintain an action for wages and disbursements against the mortgagee.

THIS was an action for the plaintiff's wages and disbursements as master of the ship *Airly Castle*, of which the defendants were alleged to be the owners.

In August 1810 *W. Maffon* was sole owner of the vessel in question. At that time he borrowed the sum of £15,000. from the commissioners appointed by an act of parliament to grant loans for the relief of persons in trade. The defendants became his sureties to government; and for their indemnification he transferred to them (amongst other things) the legal title to the ship *Airly Castle*. She was registered in the port of London; but happened then to be at Portsmouth. *Maffon* executed an absolute bill of sale of the vessel to the defendants, for the nominal consideration of 10 s. This was lodged at the custom-house, and a few days after, an indorsement was made on the certificate of registry according to the register acts. At the same time, a mortgage deed was executed conveying the vessel to the defendants for their indemnification, and containing a covenant to re-transfer her to *Maffon*.

The plaintiff had previously been employed by *Maffon* as master of the *Airly Castle*. He had no direct information of the above transaction; but the indorsed certificate of registry was delivered to him,

which shewed that the defendants had become the registered owners. He was never introduced to them, or received any orders from them, or had any communication with them respecting the concerns of the ship. On the contrary, he continued to correspond with *Maffon* as his owner. Soon after the transfer he sailed to the West Indies, and thence to the Havannah, from which he brought home a cargo to England. During the voyage he received *Maffon's* instructions for his conduct; and on his return he gave the documents for receiving the freight, to *Maffon*, who received it accordingly, and applied it to his own use. It was for the plaintiff's wages and disbursements during this voyage that the action was brought. Soon after the ship's return she was broken up as unserviceable, without having been taken possession of by the defendants, who never derived any benefit from her earnings or proceeds.

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 and another.

Garrow, S. G. maintained, that under these circumstances the plaintiff was entitled to recover. The defendants were the legal owners of the ship; they were entitled to receive her freight; and they might have disposed of her as they thought fit. They were therefore liable to those who supplied her with stores, or were employed in navigating her. Could it be doubted that an action might have been supported against the defendants at the suit of a person who repaired the ship after the transfer by the captain's orders? Such a person might unquestionably resort to the legal owners, and was not bound to inquire whether they were mortgagees or trustees, or were beneficially and exclusively interested. If the captain might give an
 action

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and another.

action against the defendants to a stranger, he surely might maintain one himself. The indorsed certificate of registry informed him of the change of title. From the moment of the transfer the defendants must be considered as his employers, and *Maffon* was merely their agent.

LORD ELLENBOROUGH.—We are here to consider, with whom has the plaintiff contracted? There is express privity of contract between him and *Maffon*. The legal ownership of the ship thus becomes immaterial. The transfer of the title to the defendants did not at all affect the relation subsisting between *Maffon* and the plaintiff. The plaintiff was employed by *Maffon* originally, and continued to treat him as his employer throughout. What right then can he have to resort to the defendants? It might as well be said, that if I mortgage my estate, my steward who continues to manage it for my benefit, may maintain an action for work and labour against the mortgagee. Title has nothing to do with these cases. We must look to the contract between the parties.

Plaintiff nonsuited.

Garrow, S. G. and *Richardson* for the plaintiff.

Park, *Abbott*, and *Campbell* for the defendant.

[Attornies, *Sherwood and Crowder & Co.*]

Vide *Westerdell v. Dale*, 7 T.R. 306. *Young v. Brander*, 3 East. 10. *Trehwella v. Rowe*, 11 East. 435. *Frazer v. March*, 13 East. 238. 2 Campb. 517.

FOMIN

FOMIN v. OSWELL and Another.

Friday,
March 5.

THE declaration stated that the plaintiff was possessed of a ship called the *Wassily*, and divers goods on board her, which he was about to send on a voyage from London to Gottenburgh and Petersburg; that for the better security of the said adventure from capture or detention by the enemies of our Lord the King, he intended to cause certain simulated papers to be put on board the said ship, importing her to have sailed with the said goods from the port of Angro in the Western Islands, whereof the defendants had notice; and that in consideration that he employed them as his agents to procure insurance to be effected for him of the sum of £1,500. upon the said ship, and £500. upon the said goods, they undertook to procure to be inserted in the policy or policies of insurance so to be effected, leave for the said ship to carry such simulated papers. The declaration then alleged, that although the defendants effected the policy, they neglected to procure such leave to be inserted in it; that the ship and goods were captured during the voyage; and that from the simulated papers being on board without such leave, the plaintiff was prevented from recovering the sums insured from the underwriters. There was another count in the declaration, for omitting to include in the policy the premiums of insurance and the duties.

Insurance brokers are not liable to an action for neglecting to insert in a policy a liberty to carry simulated papers, if the written instructions given them contain no direction for that purpose, although it may have been verbally communicated to them that simulated papers were to be used in the voyage.

Where a ship was condemned for carrying simulated papers; and, the policy containing no liberty to do so, the assured could not recover upon it:—*held*, that an action could not be maintained against the insurance brokers for having neglected to include the premiums and duties, contrary to the instructions given them for effecting the policy; as in the result the assured were not damaged by this neglect.

This is the policy of insurance mentioned in *Oswell and another v. Vigne*, 15 *East*, 70. where the Court decided,

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OSWELL
and another.

decided, that the assured on a policy on ship not having leave to carry simulated papers, cannot recover for a loss by capture, if it appear by the sentence of the foreign prize court, that one of the causes stated for the condemnation was the carrying of simulated papers (a).

The defendants were the insurance brokers who effected the policy, and who brought the former action, averring the interest to be in the present plaintiff, a Russian subject resident at Petersburg.

It was now proved that *E. Pindar*, the captain of the *Wassily*, had first some verbal conversation with the defendants concerning the insurance, in which he informed them he was to carry simulated papers. He afterwards sent them the following written instructions:

“ Messrs. Oswell & Selby.

“ Gentlemen,

“ In a late conversation on the subject of effecting
“ insurance on my ship, and the refunding £600.
“ which I had paid into the hands of Mr. Selby
“ through Mr. Bishop, in which you were kind
“ enough to acquiesce. In consequence whereof,
“ wait on you with the particulars of insurance of
“ £1,500. on the brig *Wassaly*, formerly the *Elbe*
“ of Hull, George Weyer, master, from London to
“ Gottenburgh and St. Petersburg, with or without
“ convoy, against the dangers of the seas, enemies, &c.
—“ £500. on goods, Do. Do.

(a) See also *Horneyer v. Lushington*, 15 East. 46.

—“ £600.

—“ £600. on the said brig against seizure after her arrival at Prussian port.

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—“ £2,600.—This sum to be insured *with premiums and duties*, by which you will oblige,

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and another.

“ Yours, &c.”

“ London, 21 April 1810.”

Topping, for the plaintiff, contended, that the brokers were clearly bound to insert a clause in the policy, giving leave to carry simulated papers; and as they had disobeyed positive instructions to include the premiums and duties, they must make good the loss on this score, which amounted to £350.

LORD ELLENBOROUGH.—I do not think the defendants are liable on the first ground, as the written instructions are silent concerning simulated papers. Notwithstanding the prior conversation, the captain might have resolved not to carry any; and if he was to carry them, it did not follow that he wished a leave for this purpose to be inserted in the policy, having said nothing upon the subject when he gave the particulars of the insurance.—For omitting to include the premiums, the defendants would certainly be liable if the plaintiff had thereby sustained any damage; but the Court has decided that he was not entitled to recover upon the policy, and he would not have been in a better situation if the premiums had been included. As to the first complaint, there is a loss without an injury; as to the second, there is an injury without a loss. I am therefore of opinion, that on neither ground can the action be maintained.

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and another.

The plaintiff, however, recovered a verdict for a balance of £4, admitted to be due to him upon an account rendered by the defendants.

Topping and Marryat for the plaintiff.

Garrow, S. G. and Park for the defendant.

[Attornies, *Michell and Gregfon.*]

Vide Wilkinfon v. Coverdale, 1 Esp. Rep. 74. Webster v. De Taftet, 7 T. R. 157. Comber v. Anderfon, 1 Campb. 523.

COURT OF COMMON PLEAS.

SITTINGS AT WESTMINSTER.

BISHOP AND OTHERS v. WARE.

Tuesday,
Feb. 16.

The master of a ship has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side.

THIS was an action on the case for not delivering goods according to a bill of lading,—with a count in trover.

The plaintiffs shipped at Hull, on board a vessel belonging to the defendant, a package of files, to be carried to London. The bill of lading was in the usual form, stating that the goods were to be delivered on payment of freight. When the vessel had arrived,

and

and was moored off Custom-house Quay, the plaintiffs sent a barge for their goods, which they required to be put over the ship's side into the barge, at the same time tendering the freight. The captain insisted upon his right to wharfage as well as freight, and refused to deliver up the goods till the wharfage was paid.

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BISHOP
and others
v.
WARRE.

It was now proved, by way of defence to the action, that when goods are put over the ship's side after she is moored at the wharf, half wharfage is usually paid by the consignee,—which was contended to be a reasonable demand, as the goods derive a benefit from the ship being moored at the wharf, although they are not actually landed there.

Sir JAMES MANSFIELD.—If the goods are not landed, a compensation must be made for the benefit derived from the wharf, by the owner of the ship. The goods cannot be subjected to this charge, more than to many others which are incurred by the ship in the course of the voyage. According to the bill of lading, the goods in question were to be delivered on payment of freight. The defendant, therefore, could have no right to detain them for wharfage.

The plaintiffs had a verdict.

Shepherd, Vaughan, (Serjts.) and *Brougham*, for the plaintiffs.

Best and Pell, Serjts. for the defendant.

Vide Syeds v. Hay, 4 T. R. 260.

SITTINGS AT GUILDHALL.

Coram GIBBS, J.

KERRISON v. COOKE.

Tuesday,
Feb. 23.

Where, upon an accommodation bill becoming due, it was presented for payment to the acceptor, and he promised to pay it;—*held*, that he was not discharged by time being afterwards given, without his consent, to the drawer by the indorsee, who knew that it had been accepted for the drawer's accommodation.

THIS was an action against the acceptor of a bill of exchange, drawn by J. S., payable to his own order, and indorfed by him to the plaintiffs.

The defence was, that the bill had been accepted merely for the accommodation of J. S.; that the plaintiff was aware of this circumstance; and that upon the bill becoming due, he gave time to J. S., without the concurrence of the defendant. *Laxton v. Peat*, 2 *Campb.* 185. was cited as in point.

The facts relied upon were proved; but it further appeared, that when the bill became due, the plaintiff presented it for payment to the defendant, who promised to pay it.

GIBBS, J.—Admitting *Laxton v. Peat* to be law, of which grave doubts have been entertained, the present case may be distinguished from it. Lord ELLENBOROUGH's decision there proceeded upon the ground that the drawer, according to the understanding of the different parties to the bill, was considered as primarily

liable, and was in the first instance looked to for payment. But here, payment is demanded of the acceptor when the bill becomes due, and he then promises to pay it. This shews that he was held liable as in the common case of the acceptor of a bill of exchange; and I am of opinion that he was not discharged by time given under these circumstances to the drawer. I am sorry the term *accommodation bill* ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract by putting their names to negotiable securities. . . .

The plaintiff had a verdict.

Best, Serjt. and *Tancred* for the plaintiff.

Shepherd, Serjt. and *Selwyn*, for the defendant.

Vide Collott v. Haigh ante 281.

COOPER AND ANOTHER v. GIBBONS.

Wednesday,
Feb. 24.

THIS was an action for the value of a pipe of wine; and the question was, whether it had been sold by the plaintiffs to the defendant and one *Robertson* deceased jointly, or the credit had been given to *Robertson* exclusively.

If upon a notice to produce books of account, they are not produced, this circumstance affords no legal ground for any inference respecting their contents, and merely entitles the opposite party to prove their contents by parol evidence.

The plaintiffs proved that the wine had been delivered at a house in which the defendant and *Robertson*, who were partners in trade, were living together.

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and anotherv.
GIBBONS.

The circumstance chiefly relied upon by the defendant was, that notice had been given to produce the plaintiffs' books, containing any entry of this sale, and that they were not produced.

Vaughan, Serjt. for the defendant, insisted, that the jury were bound to infer that *Robertson* alone was debited with the price of the wine, and that the sale had been exclusively to him.

GIBBS, J.—I have considered this subject a good deal, and I am of opinion that the jury are not authorized to draw any such inference from the circumstance relied upon. The non-production of the plaintiffs' books, after a notice to produce them, merely entitles the defendant to give parol evidence of their contents.

The plaintiffs had a verdict.

Best, Serjt. and *Gaselee*, for the plaintiffs.

Vaughan, Serjt. for the defendant.

OXFORD CIRCUIT.

LENT ASSIZES, 53 GEORGE III.

WORCESTER.

Coram BAYLEY, J.

SKEYE v. VOYCE.

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Monday,
March 8.

SATURDAY, March 6, was the commission day at Worcester. The Judges arrived in the evening and opened the commission in the usual form.

At the assizes, if business is not begun on the commission day, causes must be entered with the marshal before the sitting of the court on the first day of business.

This morning at nine o'clock the *Nisi Prius* Court sat for the dispatch of business. About half an hour after, *Dauncey* moved, that the judge's marshal should be directed to receive a record, and enter the cause for trial; and he contended, that till 12 o'clock, this might be insisted upon as a matter of right.

BAYLEY, J.—The plaintiff has no right to have his cause entered after the sitting of the court this morning. Where business is not done upon the commission day, causes must be entered before the court sits on the day when business is begun. I had occasion to state this

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rule the last time I sat here. It is the rule of all the circuits; and I wish it were generally known. If from mistake, or any special circumstances, a cause has not been entered in time, I will listen to an application for leave to enter it; but after the sitting of the court, the marshal has no authority to receive the record and enter the cause, without an order being made for that purpose.

Barnes for the defendant.

Vide R. G. H. 14 Geo. II. K. B. and C. P.

Tuesday,
March 9.

HODGES v. HOLDER.

In trespass quare clausum fregit, if the defendant pleads—as to coming with force and arms and whatsoever else is against the peace, *not guilty*, and as to the residue of the trespasses, a justification, which is denied by the replication; at the trial he has a right to begin and to have the general reply.

DECLARATION in the usual form for breaking and entering plaintiff's closes, and with horses and carriages treading down the grass and subverting the soil, &c. The defendant pleaded—as to coming with force and arms, and whatever else was against the peace of our lord the King, *Not Guilty*; and as to the residue of the trespasses, a right of way; which was traversed by the replication, and thereupon issue was joined.

The pleadings being opened, a question arose which party should begin. This right was claimed for the defendant, as he did not deny the trespasses and was bound to make out his justification. For the plaintiff, it was contended, on the other hand, that *Not Guilty* having been pleaded to part of the declaration, the issue lay upon him.

BAYLEY,

BAYLEY, J. held, that this plea of *not guilty as to force and arms*, was not a general issue ; and that as it did not throw the necessity of any proof on the plaintiff, the defendant ought to begin.

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v.
HOLDER.

This course was accordingly pursued. The defendant's witnesses were examined first, to prove the right of way, and the plaintiff having afterwards called witnesses to disprove it, the defendant's counsel had the general reply.

Verdict for the defendant.

Jervis, Peake, and *Puller*, for the plaintiff.

Dauncey, Abbott, and *Taunton*, for the defendant.

Vide Doe d. Corbett v. Corbett, next case.

SHREWSBURY.

Coram BAYLEY, J.

Friday,
March 19.

DOE d. Sir RICHARD CORBETT, Bart. v. CORBETT,
Clerk.

In ejectment, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, the defendant on admitting the title of the lessor of the plaintiff under the will, has a right to begin and to have the general reply.

THIS was an ejectment for the manor of *Longnor* and various other estates in the county of Salop.

The lessor of the plaintiff claimed under the will of Sir Richard Corbett, Bart. deceased, made in the year 1764; the defendant, under a codicil to the same will made in the year 1771. This codicil was impeached by the lessor of the plaintiff, on the ground that when it was executed the testator had fallen into a state of dotage, and that undue influence had been exercised over his mind.

The pleadings being opened, the defendant's counsel said, they admitted the title of the lessor of the plaintiff under the will, and claimed the right of first proving their case and having the general reply. *Goodtitle on the demise of Revett v. Braham*, 4 T. R. 496. was cited as in point, where upon a trial at bar it was decided that the defendant in ejectment is entitled to the general reply, where the plaintiff claiming by descent proves his pedigree and stops, and the defendant

defendant sets up a new case in his defence, which is answered by evidence on the part of the plaintiff.

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DOE d. SIR
RICHARD
CORBETT,
Bart.
v.
CORBETT,
Clerk.

On the other side, they denied the application of this rule, where both the contending parties claim as devisees under the same testator.

BAYLEY, J.—I think the principle is the same in both cases. The devisee named in the codicil stands in the same relation to the devisee named in the will, as the devisee named in the will does to the heir at law. Between the two latter, the question turns upon the validity of the will, and the party who has to establish it, has been held to be entitled to the general reply. I conceive, therefore, that the same privilege should be allowed to the party who has to establish the validity of the codicil.

The defendant accordingly began, and proved so very strong a case in support of the codicil, that the counsel on the other side declined offering any evidence.

Jervis, Taunton, Puller, and Campbell, for the lessor of the plaintiff.

Dauncey, Hart, Abbott, and Petit, for the defendant.

GLOCESTER.

Coram BAYLEY, J.

Monday,
April 5.

REX v. JACKSON and Another.

It is an indictable offence, fraudulently to obtain goods, by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid.

THIS was an indictment on 30 Geo. 2. c. 24. for obtaining goods on false pretences.

The prosecutor was a jeweller at Cheltenham, who was defrauded of goods to a considerable value by the defendants. Among other things, for the purpose of deceiving him, they gave him in payment of the goods a cheque upon *Wright & Co., Bankers, in Henrietta Street, Covent Garden*,—with whom it was proved they kept no cash and had no account.

Ludlow, for the defendants, contended, that as far as the cheque was concerned, they were not criminally liable; and cited *Rex v. Lara*, 6 T. R. 565. in which it was held, that an indictment could not be supported against a person for delivering a draft on a banker, which he knew he had no authority to draw, and would not be paid; whereby he obtained possession of certain lottery tickets, and defrauded the prosecutor of the value.

BAYLEY, J.—This point has recently been before the Judges; and they were all of opinion, that it is an
indictable

indictable offence, fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid.

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 {
 REX
 v.
 JACKSON
 and another.

The defendants were convicted, and sentenced to seven years transportation.

Hughes and *Harris* for the prosecution.

Ludlow for the defendant.

In *Rex v. Lara*, the indictment was at common law. *Vide* 2 East. P. C. c. 18. f. 8, 9.

REX v. MARY COLE.

Thursday,
 April 8.

THE prisoner stood charged on the coroner's inquisition with the murder of her bastard child. A bill against her for the same offence had been thrown out by the grand jury. There was no evidence to convict her of the murder; and the only question was, whether she could be found guilty of the concealment.

A woman tried on the coroner's inquest for the murder of her bastard child, may be found guilty under 43 G. 3. c. 58. f. 4. of endeavouring to conceal the birth.

Campbell, for the prisoner, contended, that Lord ELLENBOROUGH's act, 43 Geo. 3. c. 58. f. 4. authorizes the jury to find the prisoner guilty of endeavouring to conceal the birth of the child, only where she is indicted for the murder, and does not apply to a case where she is tried on the coroner's inquest, the bill for the murder having been thrown out by the grand jury.

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 Rex
 v.
 MARY COLE.

BAYLEY, J.—That point was submitted to the Judges in a case from the Home Circuit tried before the Lord Chief Baron; and they were all of opinion that the prisoner may be found guilty of the concealment, whether charged with the murder by the coroner's inquisition or a bill of indictment returned by the grand jury.

The prisoner was found guilty of the concealment, and sentenced to four months imprisonment.

Ludlow for the prosecution.

Thursday,
 April 8.

PANTON, Widow, v. JONES.

If the occupier of a house submits to a distress for rent stated in the notice of distress to be due from him as tenant to the distrainer, this is an acknowledgment of the tenancy.

THIS was an action for the use and occupation of a house at Bristol.

The defendant had never paid rent personally to the plaintiff, and she did not give strict evidence of title; but it was proved, that in January 1811, the defendant being in possession of the premises, she distrained on his goods for £39. 18s. stated to be arrears of rent then due from him to her as his landlady. He did not replevy, and the goods were sold to satisfy the rent.

Ludlow, for the defendant, contended, that the distress was no acknowledgment of a tenancy by the party submitting to it. Although he knew the plaintiff had no right to distrain, he might not be in a situation to replevy

replevy his goods, or he might think it preferable to bring an action of trespass, the time for which had not yet expired.

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PANTON,
Widow,
v.
JONES.

BAYLEY, J.—I have no doubt that submitting to a distress acknowledges the tenancy. The landlord, after distraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord.

The plaintiff recovered.

Abbott for the plaintiff.

Vide Co. Litt. 211 b. Green's Case, Cro. Eliz. 3. Zouch d. Ward v. Willingale, 1 H. Bl. 311.

 ADJOURNED SITTINGS AT GUILDHALL.

Before Easter Term,

53 GEORGE III.

BILKE, Esq. v. HAVELOCK.

Monday,
April 12.

The sheriff cannot maintain an action for the expence incurred in seizing and keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons.

INDEBITATUS assumpsit for work and labour by the plaintiff and his servants and bailiffs, in executing a writ of *testatum fieri facias*, directed to him as sheriff of the county of Surrey.

Garrow, S.G., in opening the case, stated, that while *Mr. Bilke* was high sheriff of Surrey, *Mr. Havelock* sued out a *testatum fieri facias* into that county, in an action in which he was plaintiff against two persons of the names of *Geddes* and *Millighan*. A warrant being made out under this, the officers, by *Mr. Havelock's* directions, seized a ship as the property of *Geddes* and *Millighan*. A claim, however, was put in by another party, and they afterwards became bankrupt. The sheriff required an indemnity before proceeding to a sale; *Mr. Havelock* refused to give one, but required the officers to remain in possession of the ship. They did so for more than two years, and thereby an expence was incurred of between £300. and £400.

No

No goods were sold under the writ. It was now contended, that as the sheriff received no poundage, and had actually laid out the money at the defendant's request and for the defendant's benefit, the law would raise a promise to make him a reasonable compensation.

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BILKE, Esq.
v.
HAVELOCK.

LORD ELLENBOROUGH.—The law knows of no promise to pay the sheriff for executing the King's writ. Such an action as this never was heard of in Westminster-Hall. It is the duty of the sheriff under a writ of *feri facias* to seize the goods in his bailiwick belonging to the defendant. If he is in doubt as to the property, he may impanel a jury for his own protection. If the goods are sold, he receives in poundage the specific recompence for his trouble which the law has provided. He is entitled to none for seizing and remaining in possession of goods belonging to a stranger. The office of sheriff would become a very lucrative one, if he could maintain an action for every ineffectual attempt by his officers to execute a writ.

Garrow then stated, that the present defendant had acknowledged the sheriff's right to be reimbursed for the expence of keeping possession of this ship by having paid him a sum of £30. on account.

LORD ELLENBOROUGH.—The sheriff may be very well pleased if an action is not brought against him to recover that money back.

Plaintiff nonsuited.

Garrow,

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BILKE, Esq.
v.
HAVELOCK.

Garrow, S. G. and Marryat, for the plaintiff.
Park, for the defendant.

[Attornies, *Benton* and *Meggison*.]

Vide Morris v. Burdett, 1 Campb. 218. and Wathen v. Sandys, 2 Campb. 640.

Tuesday,
April 13.

WIENHOLT v. SPITTA and Others.

If a cheque is given on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to stop the payment of the cheque.

ACTION on a banker's cheque drawn by the defendants for the sum of £532.

A house in Westphalia having received a sum of money on account of the plaintiff, directed the defendants, who are their correspondents in London, to pay it to him, but said they could not allow him interest upon it, as they had made none themselves. This being communicated to the plaintiff, he at first insisted on interest; but finally agreed, on having a cheque for the principal, to give a receipt in full. He accordingly wrote such a receipt, and received the cheque in question in exchange. Having got it into his hands, he said he should prosecute the house abroad for interest before the Chamber of Commerce at Paris. The defendants thereupon ordered payment of the cheque to be stopped.

Lord

LORD ELLENBOROUGH.—If I give a draft upon a condition, and I find the condition is to be eluded, I may stop the payment. This was a conditional delivery of the draft. When it was delivered, all still remained in *feri*. The defendants on discovering the plaintiff's intentions were fully justified in resisting the demand. The draft in his hands had become a piece of waste paper.

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WIENHOLT
v.
SPITTA
and others..

Plaintiff nonsuited.

Scarlett and Barnewall for the plaintiff.

Garrow, S. G. and Park for the defendants.

[Attornies, *Blunt and Kaye*.]

HAGEDORN v. REID.

Thursday,
April 15.

POLICY, dated 2d August 1810, on the ship *Fiesco*, at and from *Gluckstadt*, and any port or ports in the river *Elbe*, to any port or ports in the United Kingdom.

The interest was laid in one *Schroder*. The ship was captured, and the only question was, whether the insurance was legalized.

Gluckstadt is a port under the dominion of Denmark, with whom we were then at war, and *Schroder* the owner of the ship resided there. A copy of a licence

A licence to *A.B.* on behalf of himself and other British or neutral merchants, to import a cargo in a vessel bearing any flag except the French, will legalize a policy of insurance on a ship belonging to an alien enemy employed for this purpose, if the cargo is proved to belong to British or neutral merchants; but not otherwise.

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HAGEDORN

v.

REID.

was produced, dated 2d June 1810, and granted to “ J. H. P. Hagedorn of London, on behalf of himself and other British or neutral merchants,” permitting a vessel bearing any flag except the French to proceed with a cargo from any port within certain limits comprehending the river Elbe, to any port of the United Kingdom.

The original licence was transmitted to one *Doorman*, a merchant at Hamburg, which city was then in a state of neutrality. He was stated to have ordered the shipment of the goods; but there was no legal evidence that they belonged to him or any other British or neutral merchant.

LORD ELLENBOROUGH.—Had the cargo been proved to be the property of any British or neutral merchants, by whom or on whose account the licence was taken out, I think that licence would have protected the ship of an alien enemy during the adventure. The importers must be British or neutral merchants; but the ship might bear any flag except the French. Government therefore seems to have contemplated that it might be necessary to employ a ship belonging to an alien enemy, and to have authorized that act,—so that she was not French. Some evidence however is necessary, that the cargo belonged to British or neutral merchants. Though the licence would legalize the means of the importation, you must shew that the importers were of the description which the licence specifies. The condition on which it was granted must be proved to have been fulfilled. I cannot presume that goods loaded in a hostile port were not enemy's property

property, merely because the licence for the voyage was transmitted to a neutral.

Plaintiff nonsuited.

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HAGEDORN
v.
D

Note.—The following was the evidence of the licence being sent to *Doorman*. It was proved to be the invariable course of the plaintiff's office, that the clerk who copies any licence sends it off by the post, and makes a memorandum on the copy of his having done so: a copy of the licence in question was produced from the plaintiff's letter-book, in the hand-writing of one *Munday*, a deceased clerk, with a memorandum written on it by him, stating that the original had been sent to *Doorman*; and a witness acquainted with the plaintiff's mode of transacting business swore, that he had no doubt the original was sent according to the statement in the memorandum.—*Munday* being dead, Lord ELLENBOROUGH held this to be sufficient.

Entry of the deceased clerk of a merchant in the letter book, received in evidence, on proof that it was made in the usual course of business in the merchant's counting house.

Garrow, S. G., *Park*, and *Taddy*, for the plaintiff.

Topping and *Scarlett*, for the defendant.

[Attornies, *Kaye & Co.* and *Palmer & Co.*]

Vide Doe d. Reece v. Robson, 15 East, 32. *Pritt v. Fairclough*, ante, 305.

Thursday,
April 15.

FORRESTER and another *v.* PIGOU.

An underwriter who pays on a promise of repayment if the policy be determined to be invalid, is not a competent witness for another underwriter who disputes the loss.

Aliter, if the promise of repayment had been made after he had paid unconditionally, or if the plaintiff had fraudulently entered into the agreement with him for the purpose of taking off his testimony.

THIS was an action on a policy of insurance. The defence was, that there had been a concealment from the underwriters of a letter, containing material information respecting the sailing of the ship.

To support this, a gentleman of the name of *Gregory* was called, who being examined on the *voire dire* stated, that he was an underwriter on the same policy; that he adjusted and paid an average of £60. per cent. without any thing particular passing; that he was afterwards called upon for a further payment of £16. per cent.; that looking at the policy, he then asked the plaintiffs, how it happened that only himself and two others had settled; that the plaintiffs said, the rest of the underwriters disputed the loss, but if he would pay the £16. per cent. he should be placed exactly in the same situation with them, should the policy turn out to be invalid; that he thereupon paid the £16. per cent.; and that he had no doubt he should recover back the whole of his money if the defendant succeeded in the present action.

It was insisted, that under these circumstances Mr. *Gregory* was a competent witness, as the defendant had a right to his testimony, which could not be taken away by any transaction between him and the plaintiff after the action had been commenced. If the law were otherwise, it would be in the power of every plaintiff

to disqualify every witness of whose evidence he is afraid.

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FORRESTER
and another.

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LORD ELLENBOROUGH.—A subsequent promise to repay money to the witness which he had paid unconditionally, would not render him incompetent, as the promise could not be enforced, and he could only entertain the expectation of a benefit (a). Nor would the witness be disqualified by any agreement fraudulently entered into between him and the plaintiff, for the purpose of taking off his testimony. But the pendency of a suit cannot prevent third persons from transacting business *bonâ fide* with one of the parties; and if an interest in the event of the suit is thereby acquired, the common consequence of law must follow, that the person so interested cannot be examined as a witness for that party from whose success he will necessarily derive an advantage. Here, there appears to have been no fraudulent purpose to render the witness incompetent, and there is a legal obligation on the plaintiffs to repay him, at least the £16. per cent., should there be a verdict for the defendant.

The plaintiff recovered.

Garrow, S. G., Marryat, and Gaselee, for the plaintiffs.

Park, Topping, and Richardson, for the defendant.

[Attornies, Gregson & Co. and Kaye & Co.]

(a) *Bilbie v. Lumley*, 2 East, 467. *Rudd's Case*, Leach, C. C. 151. *Gilb. Law Ev.* 124.

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 and another
 v.
FIGOU.

But though an interest acquired bonâ fide in the course of business, subsequent to the event to be proved, disqualifies a witness; if a person acquainted with the facts of a cause lays a wager upon the verdict, or a

prosecutor bets that he shall convict the defendant, their competency to give evidence is not thereby destroyed. *Barlow v. Vowell*, Skin. 586. *Rex v. Fox*, 1 Stra. 652.

Saturday,
 April 17.

CLAPHAM and another, Assignees of **PEARCE** a Bankrupt, v. **COLOGAN.**

Insuring a ship by an English name does not amount to a warranty, or a representation, that she is an English ship.

A policy "at and from A. and B." is not vitiated by inserting, without the consent of the underwriters, the words, "both or either."

THIS was an action on a policy of insurance on goods. One count of the declaration stated the ship to be "the Three Sisters, at and from Cadiz and Seville to Liverpool," and another count, "the *Tres Hermanas*, or Three Sisters, at and from Cadiz and Seville, both or either, to Liverpool."

The policy was originally filled up "on the Three Sisters, at and from Cadiz and Seville to Liverpool." After it had been signed by the underwriters, the broker inserted the words "*Tres Hermanas* or," and "both or either." Several of the underwriters put their initials to the alteration; but the defendant refused to do so. When the broker effected the policy he merely called the ship "the Three Sisters," without making any representation as to the country she belonged to. In point of fact, she was originally a Dane, and was purchased by the bankrupt, a merchant at Liverpool. While at Seville on the adventure in question, he changed her name to the *Tres Hermanas*, manned her with a Spanish crew commanded by a Spanish

Spanish captain, and put her under the Spanish flag.—She was lost on the voyage home by the perils of the sea.

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CLAPHAM
and another,
Assignees of
PEARCE
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COLOMAN.

On the part of the underwriters, it was sworn, that if the ship, instead of being English, as her name in the policy denoted, had been known to be manned with Spanish seamen, and navigated as a Spaniard, it would have made a difference of two per cent. in the premium.

LORD ELLENBOROUGH, however, held, that under these circumstances the defendant was liable. The mere calling the ship by an English name, he said, could not amount to a warranty or representation that she was English; she might have been an American, or an English prize preserving her original name, or a ship built on the continent, whose name was translated into English. Suppose a ship were insured by the name of *the Mark Anthony*, if there was no representation of her country, it would be too much to say, the policy would be void, should she turn out to be an Italian called “*Il Marco Antonio*.” If the premium would be governed by the ship’s nationality, the underwriters must ask for information; they must not trust to the name (a). No harm, therefore, could be done by inserting the *Tres Hermanas* in the policy, that being a mere translation of the *Three Sisters*. So the other alteration could not vitiate the policy, being in an immaterial part. Without the words “both or

(a) *Vide* Lothian v. Henderson, 3 B. & P. 499. Le Mesurier v. Vaughan, 6 East, 382.

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either," the ship had the option of going both to Cadiz and Seville or not as it might suit the exigencies of the adventure, so that if she went to both she took them in their proper order;—and with the insertion, she still would have enjoyed the liberty under the same limitation. The legal operation of the instrument therefore is in no degree affected (*b*).

Verdict for the plaintiffs.

Garrow, S. G., Park, and Puller, for the plaintiffs.

Park, Scarlett, and Campbell, for the defendant.

[Attornies, *Crowder and Blunt*.]

(*b*) *Vide* Marson v. Petit, 1 Campb. 82. n.

[This cause was tried at the Sittings in last Hilary Term.]

SHADFORTH v. HIGGIN.

ASSUMPSIT upon the following agreement signed by the plaintiff and defendant :

“ James Shadforth, part owner of the ship *Fanny* of 300 tons, coppered and armed, agrees to dispatch said vessel immediately in ballast direct to Jamaica, and on her arrival at Rio Nova Bay, Salt Gut, and St. Ann’s, receive a full and complete cargo of produce, consisting of sugar, rum, coffee, and pimento. In return Messrs. Higgin and Co. agree to provide a cargo at the above shipping places, to be taken on board in the usual manner, in time for July convoy, *provided she arrives out and ready by the 25th of June*, and the freight to be at the current rate as given to other vessels loading at the same time and same ports.”

Where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her, in time for the July convoy provided she arrived out and was ready by the 25 June;—*held*, that as she did not arrive out till after the 25 June the freighter was entirely discharged from his contract to furnish a cargo.

The declaration alleged, that the defendants did immediately dispatch the vessel in ballast to Jamaica, and that on her arrival at Rio Nova Bay she was afterwards, to wit, on the 3d of July, and from thence for a long space of time, to wit, for the space of three months from thence next ensuing, ready to receive at Rio Nova Bay, Salt Gut, and St. Ann’s aforesaid, a full and complete cargo of produce, according to the form and effect of the said agreement; yet that the defendant did not nor would provide a cargo for the

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saïd vessel at the above shipping places, or any one either of them, according to the form and effect of the saïd agreement, whereby the saïd ship was obliged to return from Jamaica without any cargo being loaded on board thereof.

The ship in point of fact did not reach Jamaica till the 3d of July; and the question was, whether under these circumstances the defendant was answerable for having failed to furnish her with a full cargo.

Garrow, S. G., for the plaintiff, contended, that the defendant was bound to furnish a full cargo for the ship at all events. Provided she arrived out and was ready by the 25th June, this was to be done in time to enable her to sail with the July convoy. The condition of her arriving by 25th June only applied to the time of her departure on the homeward voyage. If by any accident her arrival was delayed beyond the day specified, she was still entitled to a cargo in a reasonable time, as if the proviso and the mention of the July convoy had not been introduced into the agreement. It could hardly be meant, that where the owner was absolutely bound to dispatch his ship to Jamaica, if she arrived a day later than was expected, the freighter might send her home empty.

Lord ELLENBOROUGH.—I think the arrival of the ship by the 25th June was a condition precedent. The freighter might know, that if she arrived by that day he could easily provide a cargo for her; but that afterwards it might be impossible. He might have had goods of his own, which it was essentially necessary should be shipped by that day, and which he was therefore

therefore compelled to load on board another vessel. It would be a great hardship upon the freighter if he were bound to provide a freight for a vessel which arrives at a season of the year when there is no produce ready for shipping in the island. If the freighter is liable, although the ship does not arrive till a week after the day agreed upon, where is the line to be drawn? I think the fair interpretation of the instrument is, that unless the ship arrived by the 25th June, the defendant's liability was to be at an end.

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v. .
HIGGIN.

The plaintiff likewise failed in establishing another agreement declared upon for the loading of the ship, and submitted to be nonsuited.

Garrow, S. G., Abbott, and Campbell, for the plaintiff.

Park, Topping, and Marryat, for the defendant.

[Attornies, Nind and Sudlow.]

Where, however, the default of which the freighter complains, does not go to the whole consideration for his contract, and he has derived some benefit from the use of the ship, the covenant broken on the part of the ship owner is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. Therefore, if the voyage has been performed, it is no defence to an action for the stipulated freight,

to shew the breach of a covenant to sail *with the first wind*, (Constable v. Cloberie, Palm. 397.)—or to sail *direct* to the port of destination, (Borman v. Looke, 1 Campb. 377.)—or to sail *with the first convoy* on the intended voyage, (Davidson v. Gwynne, 12 East, 381.)—or that the ship should *forthwith* be made tight and staunch, (Havelock v. Geddes, 10 East, 555.)—or that the master should take on board *a full and complete cargo*, (Ritchie v. Atkinson, 10 East, 295.)

Saturday,
March 6th.

BEAURAIN Gent. v. Right Hon. Sir W. SCOTT.

An action on the case may be maintained against a judge of the ecclesiastical court who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order.

The practice of the ecclesiastical court is matter of fact to be proved by evidence, and left to the jury.

THIS was an action on the case, for unlawfully excommunicating the plaintiff.

The declaration stated, that at the time of committing the grievance complained of, the defendant was Vicar General and Official Principal of the Consistorial and Episcopal Court of *Beilby*, by divine permission then Lord Bishop of London; that the plaintiff was a person of good fame, and a practising attorney; that a cause of separation from bed and board and mutual cohabitation was then depending in the said Court, in which a minor son of the plaintiff was cited to appear before the defendant, to answer *Anne Beaurain* his lawful wife in the said cause, but to which the plaintiff was no party; yet that the defendant required the plaintiff to take upon himself, the burthen of guardian to his said infant son, and appear in such suit as guardian *ad litem*; which burthen the plaintiff wholly refused to take upon himself, as he lawfully might; that the defendant afterwards signed with his name and published a certain instrument, purporting to be a schedule of excommunication; by which said instrument the said defendant, as Vicar General of the said Bishop of London, and Official Principal of his Consistorial and Episcopal Court, pretending to be armed with legal authority, and pretending that justice so required, unjustly and unlawfully decreed the said plaintiff to be excommunicated for certain alleged contempts

contempts and contumacy in not appearing at a certain day and place as the guardian assigned to his said infant son; whereas the plaintiff was not legally appointed the guardian *ad litem* for his said son; that the said schedule of excommunication was signed and published without the plaintiff's having been served with any citation, monition, decree, or legal notice whatsoever to take upon himself the burthen of the said guardianship; that such excommunication was afterwards read during divine service in the parish-church of St. Botolph, Bishopsgate, the same being the parish where the plaintiff resided; and he was then and there openly and publicly declared and denounced excommunicated by the minister of the said parish; by means whereof the plaintiff had suffered in his good name, been injured in his profession, sued by his creditors, and reduced with his family to great distress, poverty, and ruin.—Plea, the General Issue.

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 v.
 Right Hon.
 Sir W. SCOTT.

It appeared that Sir WILLIAM SCOTT, as Vicar General and Official Principal of the Consistorial Court of the Bishop of London, had required the plaintiff to appear as guardian *ad litem* to his son; and ordered him to be excommunicated for refusing to do so. On appeal to Sir JOHN NICHOLL, as Dean of the Arches, that learned judge held that Mr. *Beaurain* was compellable to become guardian *ad litem* to his son, and that the excommunication was regular. The matter being referred back to the Consistorial Court, the schedule of excommunication issued, and was published in the parish church of St. Botolph, Bishopsgate.

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BEAURAIN
Gent.

v.
Right Hon.
Sir W. SCOTT.

The plaintiff's counsel contended, that the action was maintainable on two grounds: 1st, Because the Ecclesiastical Court had no authority to compel Mr. *Beaurain* to become guardian to his son against his will, but ought either to have appointed one of its own officers guardian, as is done in the courts of equity, or allowed a guardian to be appointed by the plaintiff in the suit, as is done in the courts of common law; and 2dly, Because no regular citation or monition had been served upon Mr. *Beaurain* before the excommunication was directed. It was allowed that he had previously made an affidavit in the suit respecting the appointment of a guardian, and that he had verbal notice of the order to appear as guardian; but it was insisted, that till a regular citation or monition was served upon him, he was not properly before the Court, and the Judge could have no authority to proceed to excommunication.

On the other side, they did not deny that the action might be maintained if the Ecclesiastical Court had exceeded its jurisdiction; but they called witnesses to prove that the plaintiff was bound to become guardian for his son, and that the proceedings against him were perfectly regular.—Among these was Sir JOHN NICHOLL, who stated, that he continued of the same opinion as when he dismissed the appeal.—It was proved that the plaintiff might have done all that was required of him with hardly any trouble and no expence; and that, in point of fact, he was acquainted with the order to become guardian *ad litem* as soon as it was pronounced. It further appeared, that after the excommunication Sir WILLIAM SCOTT had behaved

haved with great generosity to the plaintiff, amidst the misfortunes which then overtook him ; and that he had expressed the most unbounded gratitude for the kindness he experienced.

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v.
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Lord ELLENBOROUGH left it to the jury to decide upon the effect of the evidence, stating, that he himself did not perceive any thing unreasonable in the plaintiff being required to become guardian *ad litem* in the manner described, and that the plaintiff seemed to have had sufficient notice of the appointment according to the practice of the Ecclesiastical Court.

The jury found a verdict for the plaintiff with *forty shillings* damages ; observing, at the same time, that they did not mean to throw the slightest reflection upon the highly respectable character of Sir WILLIAM SCOTT.

No motion was made for a new trial, or in arrest of judgment.

Park, Brougham, and Tindal, for the plaintiff.

Garrow, S. G. and Holroyd, for the defendant.

[Attornies, *Flashman* and *Wilson*.]

Vide *Boraine's Case*, 16 Vesey jun. 346. where upon an application to the Court of Chancery for a writ of *affoiler*, to be directed to the BISHOP OF LONDON, requiring him to absolve the plaintiff from this excommuni-

cation, Lord ELDON, C. observed, " At present I cannot see the principle, upon which, with regard to a son *forisfamiliated*, the father can be compelled to be guardian *ad litem*." His Lordship likewise said, " that

1812. "that where the Spiritual Court has excommunicated a person for a cause for which they have not by the law of the land authority to do so, he has a right to some such writ;"—but, excommunication being in the nature of process to assist a demand against the party excommunicated, the writ was refused because no notice of motion had been given to the complainant in the Spiritual Court.—Where the Judge of any Spiritual Court excommunicates a man for a cause of which he has not the legal cognizance, he is also liable to be indicted at the suit of the King. 2 Inst. 623. 3 Bl. Com. 101.
- BEAURAIN**
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CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Easter Term,

53 GEORGE III.

ADJOURNED SITTINGS AT WESTMINSTER.

1813.

ANNE WILSON v. MITCHELL.

Thursday,
June 3.

ASSUMPSIT for board and lodging. Plea, the General Issue.

The defence set up was, coverture in the plaintiff when the debt accrued. She at that time lived by herself, and kept a boarding-house in Pall Mall. One of the plaintiff's witnesses stated in cross-examination, that she had acknowledged she was previously married to one *William Wilson*, who is still alive; but that, she added, there was something irregular in the marriage, so that it did not stand good.

Littledale, for the defendant, offered to prove acknowledgments both by her and *William Wilson*, made

To support a defence to an action of assumpsit, that the plaintiff was under coverture when the cause of action accrued, although she lived as a single woman,—it is not enough to prove a bare declaration by her that she had been married to J. S. who was still alive, without equal proof of the marriage, or of cohabitation with her supposed husband;—particularly if there appear any reason to doubt that the marriage was valid.

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 WILSON
 v.
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without qualification or restriction, that they were married together; but said, he was not prepared with evidence of the actual marriage, or that they had lived together as man and wife.

Lord ELLENBOROUGH held the acknowledgments of the parties in such a case to be insufficient, without some proof of an actual marriage; and the plaintiff had a verdict.

Garrow, A. G. and Comyn, for the plaintiff.

Littledale for the defendant.

[Attornies, *Bellamy and Roger.*]

Vide Abbott v. Plumbe, Doug. 215. Call v. Dunning, 4 East. 53

Thursday,
 June 3.

ODELL v. WAKE AND ANOTHER.

A. being assignee of a lease, puts it up to auction: B. becomes the purchaser, pays a deposit, and orders an assignment to him to be prepared by A.'s solicitor;—which is accordingly prepared and executed by A.: but instead of being delivered to B., it remains in the possession of the solicitor, who claims a lien for the expence of preparing it. *Held*, that to an action against A. as assignee of the term for rent accruing due after he had executed the assignment, these facts were sufficient to support a plea, that before the rent became due, he had assigned to B.

COVENANT for rent against the defendants, as assignees of the term. Plea, that they had assigned to one P. O. before the rent became due.

The defendants were the assignees under a commission of bankrupt, sued out against the lessee. They put up the premises to auction, and P. O. became the purchaser and paid a deposit. He then gave orders

to the solicitor to the assignees to prepare an assignment of the lease. It was prepared accordingly, and executed by the assignees and the bankrupt two years ago, before any rent became due; but it has remained ever since in the hands of the solicitor to the assignees, who has a lien upon it for the expence of preparing it.

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 ODELL
 v.
 WAKE
 and another.

Richardson for the plaintiff contended, that as the assignment had not been delivered to, nor accepted by P. O., it did not operate to pass the term to him; he was not liable for the rent, and the liability of the defendants therefore continued. In equity he might be compelled to accept of the assignment according to his contract, but it could not be forced upon him at law; and till he had actually accepted it, the mere execution of the deed did not alter the rights or liabilities of the parties.

Lord ELLENBOROUGH, however, held that under the circumstances the assignment was complete before the rent became due; and the plaintiff submitted to be nonsuited.

Richardson and *Clarke* junior for the plaintiff.

Garrow, A. G. and *Marryat*, for the defendant:

[Attornies, *Rutledge* and *Wilkinson*.]

Vide Chancellor v. Poole, Doug. 764. Taylor v. Shum, 1 Bof. & Pul. 21.

Thursday,
June 3.

WYATT and another, Assignees of SHEPPARD a Bankrupt, v. BLADES and another, late Sheriff of Middlesex.

Where after a secret act of bankruptcy the sheriff took in execution the goods of a trader under a fi. fa. and removed them to a broker's, and the assignees of the bankrupt afterwards served a notice upon him not to sell them; for which reason they were allowed to remain unsold at the broker's; held, that the sheriff was liable to an action of trover at the suit of the assignees, without any demand of the goods.

TROVER for taking the bankrupt's goods in execution after a secret act of bankruptcy.

The act of bankruptcy was committed the 8th December last. The goods were seized on the 8th of February following, and carried to a broker's. On the 12th of the same month the commission issued, and notice was afterwards served upon the sheriff not to sell the goods, as they belonged to the assignees. In consequence, the goods were never sold, but still remain at the broker's, and no demand of them was ever made.

Topping argued, that under these circumstances there was no evidence of conversion. The goods remained in specie, and were always ready to be delivered up to the assignees. They had been seized under legal process; and the notice not to sell was in itself a waiver of the removal of the goods, amounting to an assertion that they had not been converted by the sheriff, but still existed as the property of the assignees.

LORD ELLENBOROUGH.—Had the goods not been removed, it would have been difficult to say there was any conversion; but I think the removal of them after the act of bankruptcy is a sufficient conversion to maintain the action, notwithstanding the subsequent notice.

The plaintiffs recovered.

Garrow,

Garrow, A. G. and Barrow, for the plaintiffs.

Topping and Lawes for the defendants.

[Attornies, *Jeffre and Smith.*]

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WYATT
and another,

v.
BLADES
and another.

Vide Countess of Rutland's case, 1 Rol. Abr. 5. (L) pl. 1.

FAIRLIE v. BIRCH AND ANOTHER, Sheriff of Middlesex. Friday, June 4.

THIS was an action against the late sheriff of Middlesex for the escape of one *Milbourne* on mesne process.

The plaintiff gave in evidence the sheriff's return of *cepi corpus* to the writ, and proved that *Milbourne* did not put in bail above, and was not in the sheriff's custody at the return of the writ.

It was contended for the defendants, that the warrant should be produced, and direct evidence should be given of the arrest and escape.—But,

LORD ELLENBOROUGH held, that both facts were sufficiently proved, by the sheriff's return and the non-appearance of the party according to the exigency of the writ.

The plaintiff had a verdict.

D d 3

Park

In an action against the sheriff for an escape upon mesne process, it is enough, without producing the warrant, or giving direct evidence of the arrest or escape, to prove the sheriff's return of *cepi corpus*, and to shew that the party did not put in bail, and was not in the sheriff's custody at the return of the writ.

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FAIRLIE

v.

BIRCH
and another.]*Park and Comyn for the plaintiff.**Holt for the defendants.*[Attornies, *Lee and Smith.*]

Saturday, June 5.

COUPLAND v. HARDINGHAM.

It is universally the duty of the occupier of a house having an area fronting a public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened.

THIS was an action on the case for negligence in not railing in or guarding an area before the defendant's house in *Wood Street, Westminster*, whereby the plaintiff fell down into the area, and was severely hurt.

It appeared, that before the defendant's house there is an area, which is descended to by three steps from the street, and from which there is a door leading into the basement story of the house: there is no railing or fence to guard the area from the street: the plaintiff passing by in a dark night, fell into it, and had his arm broken.

The defence set up was, that the premises had been exactly in the same situation as far back as could be remembered, and many years before the defendant was in possession of them.—But,

Lord ELLENBOROUGH held, that however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had

had been before exposed, and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance. His Lordship said, the area belongs to the house, and it is a duty which the law casts upon the occupier of the house to render it secure.

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COUPLAND
v.
HARDING-
HAM.

The plaintiff had a verdict.

Garrow A. G. and *Marryatt* for the plaintiff.

Park and *Reader* for the defendant.

[Attornies, *Loney* and *Pickering*.]

Vide *Butterfield v. Forrester*, 11 East, 60. *Payne v. Rogers*, 2 Hen. Bl. 349.

STONEHOUSE and ANOTHER, Assignees of DE CAPET, a Bankrupt, v. DE SILVA. Wednesday,
June 9.

THE plaintiffs described themselves as assignees of *M. De Capiet*, a bankrupt, and declared upon a contract entered into by him before his bankruptcy with the defendant; whereby, in consideration that he sold the defendant a quantity of artificial flowers, the latter undertook to deliver to him two pipes of Madeira wine.

The assignees under a joint commission against A. and B. in suing on a separate contract entered into with A. may describe themselves generally as the assignees of A. without noticing the name of B.

A joint commission of bankrupt was put in against *M. De Capiet* and *Pereira de Souza Caldas*, who had carried on the business of wine merchants in partner-

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ship ;

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 STONEHOUSE
 and another,
 Assignees of
 DE CAPIET,
 a Bankrupt,
 v.
 DE SILVA.

ship ; and it was under this commission that the plaintiffs were appointed assignees. *De Capiet* likewise carried on the separate trade of a manufacturer of artificial flowers ; and the action was brought on a contract entered into with him on his separate account.

Park objected, that the plaintiffs had not properly described themselves in the declaration. That description could only be supported by a separate commission against *De Capiet*. They were, and ought to have been denominated, the assignees of *De Capiet* and *Caldas*.

LORD ELLENBOROUGH.—This action being on the separate contract of *De Capiet*, I do not think it was necessary to introduce the name of *Caldas*. The description the plaintiffs give of themselves, as far as it goes, is true, and is supported by the evidence. They are the assignees of *De Capiet* ; and as to all separate transactions, the commission is separate. The defendant could not be led into any injurious mistake by this description ; for as to his defence, it is immaterial whether the commission was separate or joint.

The plaintiff had a verdict.

Topping and *Abbott* for the plaintiff.

Park and *Barrow* for the defendant.

[Attornies, *Jones* and *Barrow*.]

Vide *Hancock v. Haywood*, 3 T. R. 433. *Streatfield v. Halliday*, 3 T. R. 779.

HOPKINSON

* HODGKINSON v. WILLIS.

Thursday,
June 10.

THIS was an action against the maker of two promissory notes. The defence was, that they had been given in lieu of two bills of exchange which were tainted with usury.

On a trial at law, an examined copy of the plaintiff's answer to a bill in equity may be read in evidence against him, without producing the original.

To prove that the notes had been substituted for the bills, the defendant proposed to read in evidence an examined copy of the plaintiff's answer to a bill of discovery filed against him in the court of Chancery. A witness first produced an examined copy of the bill, and then an examined copy of the answer. The names of the parties in the equity suit appeared to be the same as those of the parties to the present action; but there was no evidence of identity.

Garrow, A. G., maintained that the answer could not be read, unless the original were produced, and the signature proved to be the hand-writing of *Hodgkinson*, the now plaintiff. This is always required upon indictments for perjury, and there is no difference, as to the rules of evidence, between civil and criminal proceedings.—It was impossible to say who the *Hodgkinson* was against whom this bill was filed; and even if it was the plaintiff in the present action, a fictitious answer might have been filed in his name.

LORD ELLENBOROUGH.—I must have some evidence of the identity of the parties. But when it is established

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 WILLIS.

blished that the bill in equity was filed by the now defendant against the now plaintiff, I will presume that the answer appearing on the file of the court of Chancery was put in by the latter, and I shall hold the examined copy sufficient without the production of the original.

The plaintiff's attorney was then called, and stated, that the bill had been filed by the defendant against his client; whereupon the examined copy of the answer was read in evidence; but the usury could not be substantiated, and the plaintiff recovered.

Garrow, A. G., and Best for the plaintiff.

Park for the defendant.

[Attornies, *Stokes & Guppage.*]

But an affidavit made by the vendor of an estate before a Master in Chancery, to satisfy the purchaser that the estate was free from incumbrances,

being extrajudicial, cannot be proved without producing the original. *Smith v. Goodier*, 3 Mod. 36. *Gilb. Law Ev.* 57.

**MATTHEWS v. WEST, LONDON WATER WORKS
COMPANY.**

Thursday,
June 10.

THIS was an action against the West London Water Works Company (which is incorporated by act of parliament), for negligence in making an excavation and throwing up rubbish in a public street, without properly guarding the same; whereby a stage coach, which the plaintiff was driving, was overturned, and he was severely hurt.

An action on the case may be maintained against an incorporated Water-works Company, where workmen employed by persons who contract with the Company to lay down pipes for conducting water through a public street do the work in a negligent manner, whereby an individual passing along the street receives an injury.

It appeared that the West London Water Works Company contract with certain pipe-layers to lay down iron pipes for the conveyance of water through the different streets of the metropolis, and that the pipe-layers hire the men actually employed to do the work. These men, in laying pipes in Tottenham-Court-Road, left a quantity of rubbish in the street, without any light sufficiently to shew it, or watchman to warn passengers of their danger. The consequence was, that the Liverpool coach, driven by the plaintiff, was overturned, his leg was broken, and he was rendered a cripple for life. The question being made, whether, under these circumstances, the action ought not to have been brought against the pipe-layers?—

Lord ELLENBOROUGH said, he had no doubt the Water Works Company was liable, and the plaintiff recovered a verdict for £525. damages.

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v.
WEST
LONDON WATERWORKS
COMPANY.

Garrow, A. G., and Curwood for the plaintiff.

Dampier and Selwyn for the defendants.

[Attornies, *Henrich & Sloper.*]

Vide *Bush v. Steinman*, 1 B. & P. 405. *Flower v. Adam*,
3 Taunt. 314.

Saturday,
June 12.

BUDD v. MARY FOULKES.

A person put in to superintend an unlicensed house for the reception of lunatics is liable to the penalties of 14 Geo. 3. c. 49. without having any share in the profits of the establishment.

THIS was an action of debt in the name of the treasurer of the College of Physicians, on 14 Geo. 3. c. 49. s. 1., to recover a penalty of £500. for concealing, harbouring, entertaining, and confining in a house kept for the reception of lunatics, more than one lunatic at one time, without having a licence for that purpose.

It was proved that in an unlicensed house of which the defendant acted as the mistress, several female lunatics were kept, within six months before the suing forth of the writ.

Marryat, for the defendant, proposed to prove that she was merely a servant; that the house in point of fact belonged to a Mr. *Dunston*, and that it was kept by her on his account.

LORD ELLENBOROUGH.—It is immaterial whether the defendant has any interest in the house or not.

If

If a person be put in to manage such a house for another, that person is liable. Here the defendant *harboured, entertained, and confined* the unhappy females that were under her care in this house kept for the reception of lunatics. A different construction of the statute would permit its wholesome provisions to be evaded without difficulty.

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OF
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FOULKS.

Some doubt arose as to the necessary evidence, that the plaintiff was treasurer to the College, in whose name the action must be brought. No witness was called who was present at his election; but the annals of the *Comitia Majora*, in the hand-writing of *Dr. Harvey*, the registrar, and signed by *Sir Francis Milman*, the president, were produced, recording his appointment; and it was proved that he had afterwards acted as treasurer. Lord Ellenborough held this to be sufficient.

In an action on 14 Geo. 3. c. 49. by the Treasurer of the College of Physicians,—to prove his right to sue in that capacity, it is enough to put in the annals of the *Comitia Majora* recording his appointment, and to shew that he afterwards acted as treasurer, without calling any one who was present at the election.

The plaintiff had a verdict.

Garrow, A. G., Park, and Dampier, for the plaintiff.

Marryat for the defendant.

[Attornies, *Roberts and Selby*.]

Vide Rex v. Campbell, 1 Campb. 91.

Monday,
June 14.

**M'CULLOCH v. ROYAL EXCHANGE ASSURANCE
COMPANY.**

Where there is an insurance on ship and freight, and the ship has arrived in safety and earned freight, the assured cannot afterwards claim a return of premium on the ground that he had no insurable interest, on account of a defect in his title to the ship.

THIS was an action of debt for money had and received, to recover the sum of £1,260. as a return of premium upon a policy of insurance executed by the defendants.

The case came on upon admissions, which stated,—

“ That on the 21st of August 1812 a policy of insurance was effected by Messrs. Amyand, Cornwall, and Co. with the defendants, by the order and on account of the plaintiff, for the sum of seven thousand pounds, upon the ship *Duke of Kent* and her freight, being £2,000. upon the ship, and £3,000. on freight, on a voyage from *Saint Domingo* to the port of *London*, at a premium of £21. per cent.

“ That a return of premium for the ship's sailing armed with 12 guns, and arrival as stipulated by the policy, has been made by the defendants, leaving the sum of £1,260. as the net premium paid to them for effecting the said policy.

“ That in the month of May 1809 the said ship proceeded upon a voyage to the West Indies from the port of London, and that Mr. *Richard Gardiner* was then the sole owner thereof in the register of the port of London, and that he is now the sole registered owner in the said register in the said port, and that he has never transferred his property in the said ship to any person, nor has the same ever been transferred by his consent or authority,

“ That

“ That the said ship arrived at Martinique, where she took in a cargo on freight for Europe, and sailed from thence on the 1st August 1809.

“ That having met with damage on the said last-mentioned voyage, the said ship put into the harbour of St. John’s, Antigua, in distress, and, after being surveyed by a warrant from the Vice-Admiralty Court of that Island, she was condemned to be sold as being unfit to be repaired, and was accordingly sold by virtue of an order of the said Vice-Admiralty Court to Matthew King.

“ That Matthew King afterwards obtained from the proper officer of the customs of the said island a new colonial register for the ship, and remained in possession of her till September 1811, during which time he caused her to be repaired at a great expence, conceiving that he had obtained by virtue of the sale herein-before mentioned, a full and complete title to the said ship.

“ That in September 1811 the said Matthew King sold the said ship to the plaintiff at Guadaloupe for the sum of 14,500 dollars, and executed a regular bill of sale of her to him, at which time and till some days after the arrival of the ship in England (as herein-after mentioned), the plaintiff had no notice or knowledge of any adverse claim or title to the said ship, but on the other hand was fully convinced that he had acquired a good and sufficient title thereto.

“ That the plaintiff, after the purchase of the said ship, and while he retained the possession thereof, ex-

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 & . .
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pended the sum of £3,346, in various disbursements for the use of the said ship, and for the outfit of the voyage in question.

“ That the plaintiff employed the said ship in a coasting voyage to the Spanish Main, and in June 1812 he procured a freight for her at St. Domingo for London, being the voyage insured by the policy in question, where she arrived on or about the 20th September last, and safely delivered her cargo; and the freight of the said cargo, amounting to about the sum of £2,867. 10s. 11d. has been duly paid to the plaintiff.

“ That after the arrival of the said ship, and the delivery of her cargo, the said Richard Gardiner obtained possession of the said ship under an Admiralty warrant, and now seeks to recover the amount of the freight so paid to the plaintiff.”

Scarlett, for the plaintiff, contended, upon these facts, that he had no insurable interest in the ship or freight, and that therefore the premium might be recovered back. *Reid v. Darby*, 10 East. 142. is an express authority to shew, that no property or interest in the ship was transferred by the sale under the sentence of the Vice-Admiralty Court at Antigua. The exclusive ownership therefore all along remained in *Gardiner*, in whose name she stood registered. The plaintiff was tortiously in possession of her, and would have been liable to an action of trover for refusing to deliver her up. It has often been decided, that courts of justice can look to no title to shipping except what

is evidenced by the register acts; and the plaintiff having no title to the ship, if a loss had happened, he could not have succeeded in an action on the policy. The production of the register in the name of *Gardiner* must have completely defeated his claim.—That part of the insurance which is on freight comes exactly under the same consideration. In *Camden v. Anderson*, 5 T. R. 709. it was determined, that no one can have an insurable interest in freight except the registered owner of the ship. The Court there said, “the right to freight results from the right of ownership; and if the plaintiffs have no title to the ship, they have no interest in the freight. And if the plaintiffs have neither a legal nor equitable interest in the ship, they have no interest which is the subject of an insurance.” Thus the Defendants have incurred no liability, and have received the premium without running any hazard. The premium was paid to them without any consideration, and they cannot be allowed to retain it. This is not a wagering policy. There is no illegality on the part of the plaintiff. He believed the ship to be his own when he effected the insurance. Therefore, it is like the common case of short interest. In *Routh v. Thompson*, 11 East. 428. where the captors of a Danish ship were found not to have an insurable interest in her, it was clearly held that they were entitled to recover back the premium; and it seems impossible to distinguish that case from the present.

LORD ELLENBOROUGH. In *Routh v. Thompson*, a loss had happened and an action was brought against the underwriters to recover the sum insured. They resisted the demand on the ground that there was no

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insurable interest. As they denied their liability on the policy, they were not under these circumstances allowed to retain the premium. But here the voyage has been performed, and the ship *has* arrived in safety. The freight has been earned and paid. It strikes me as now too late to rip up the matter, and to say you had no insurable interest. You might have rescinded the contract before the event; but after that has been determined in favour of the underwriters, it does not lie in your mouth to tell them they never were liable, and that the premium was a payment without consideration. I am perfectly clear the plaintiff has no right to recover. It would place underwriters in a very awkward situation, if after the safe arrival of the ship, the assured could come to them and say, "We had no legal title to her; on account of some secret transactions which you had no means of investigating, we had no insurable interest; and you must pay us back the premium which you imagined you had earned."

Plaintiff nonsuited.

Scarlett, Campbell and Spankie for the plaintiff.

Garrow, A. G. Park and Bosanquet for the defendants.

[Attornies, *Blunt and Kaye*.]

Vide Lowry v. Bourdieu, Doug. 467. *Vandyck. Hewitt*, 1 East, 97.

 ADJOURNED SITTINGS AT GUILDHALL.

CLARKE and Another, v. NOEL.

Wednesday,
June 16.**A**CTION for goods sold.

The purchaser of goods to be paid for by bill upon his agent, is not discharged by the feller taking a renewal of the bill without giving him notice, if the agent had not funds in hand to pay the bill when it became due.

The plaintiffs were manufacturers at *Birmingham*, and sent out the goods in question by the defendant's orders to *Rio Janeiro*, where he resided. By an agreement between the parties, the plaintiffs were to be paid the value of the goods by bill upon one *Aaron*, an agent of the defendant in London. The plaintiffs accordingly drew a bill for the amount upon *Aaron*, which he accepted. When it became due, he had produce in his hands consigned to him by the defendant more than sufficient to satisfy it; but there was no market for this at that time. He stated to the plaintiffs that he was unable to pay the bill; and they twice allowed him to renew it, without informing the defendant. *Aaron* afterwards failed, with money of the defendant's in his hands more than sufficient to answer the acceptance.

Garrow, A. G. contended that under these circumstances the defendant was discharged; as the plaintiffs had given a new credit to *Aaron*, and made him their debtor. But,

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v.
NOEL.

LORD ELLENBOROUGH was of opinion, that *Aaron* was only in the nature of a surety; and remarked, that as he was not in cash to pay the bill when it became due, it was rather in favour of the defendant to allow it to be renewed. The debt was originally due from the defendant; and the security taken from his agent could be no extinction of it. It was impossible to say that the purchaser of goods could be discharged under these circumstances by want of notice, like the drawer of a bill of exchange.

The plaintiffs had a verdict, which in the ensuing term, upon a motion for a new trial, was approved of by the court.

Park and *Copley* for the plaintiffs.

Garow, A. G. and *Scarlett* for the defendant.

[Attornies, *Bourdillion* and *Searle*.]

Vide *Owenfon v. Morfe*, 7 T. R. 64. *Tapley v. Martens*, 8 T. R. 451.

Wednesday,
June 16.

EICKE v. MEYER.

Where colonial produce is sold, through the intervention of a broker; by the usage of trade in London, (which was held to be valid,) he is entitled in all instances (if there be no express stipulation to the contrary) to $\frac{1}{2}$ per cent. commission from the purchaser, as well as from the seller.

ACTION for work and labour as a broker, and for commission.

The

The plaintiff is a sworn broker of the city of London. In November and December last he bought several parcels of coffee from different persons for the defendant, and sent him in a *bought note* for each. In some of these a charge was made of " $\frac{1}{2}$ per cent. brokerage," in others brokerage was not mentioned. Upon some of these purchases the plaintiff had received $\frac{1}{2}$ per cent. brokerage from the sellers; in others, by express stipulation, he was to receive from the sellers no brokerage at all. As to some of the parcels of coffee, he was first employed by the sellers to dispose of them; as to others, he went in the first instance to the sellers, and offered to purchase them on behalf of the defendant. Upon the whole he claimed from the defendant a commission of $\frac{1}{2}$ per cent. In support of the demand a great number of brokers and merchants swore, that unless there be some express agreement to the contrary, it is the usage of trade in London, for the person who purchases colonial produce through the intervention of a broker, to pay him $\frac{1}{2}$ per cent. commission, whether he employs the broker originally to look out for the commodity, or the broker, having been originally employed by the seller, offers him the commodity to purchase; and whatever bargain as to brokerage there may be between the broker and the seller; and whether the brokerage be or be not mentioned in the sale note, if that expresses that the goods are bought by order and on account of the purchaser.

1813.

EICKB

v.

MEYER.

Garrow, A. G. for the defendant contended, that by law there can be no claim to brokerage from the purchaser, except where the broker is employed by him in the first instance to purchase the goods; that

1813.

Eicke

v.

MEYER.

where he is employed by the feller to dispose of them, his demand is only on the feller, whose agent he is, and that being paid $\frac{1}{2}$ per cent. commission by the feller, he can have no right to any further remuneration for his services.—But,

Lord ELLENBOROUGH held the usage as proved to be good, and the plaintiff recovered the full amount of his demand.

Scarlett and Campbell for the plaintiff.

Garrow, A. G. and Puller, for the defendant.

[Attornies, *Eicke and Kearsey*.]

Thursday,
June 17.

BUCKMAN v. LEVI.

A delivery of goods at a wharf is not sufficient to charge the purchaser, unless the seller procures them to be booked, or takes a receipt for them, or delivers them in such a manner as to furnish a remedy over against the wharfinger.

THIS was an action for goods sold and delivered, to recover the value of two dozen of chairs.

The plaintiff is a chair manufacturer in London, who had been in the habit from time to time of supplying chairs to the defendant, an upholsterer at *Wells*, in Norfolk. These chairs had been carried by the plaintiff to *Harrison's Wharf, Irongate*, from whence they were forwarded by water to the defendant. Sometimes they were booked at the wharf, and sometimes they were not; but till the parcel in question, which never reached him, they had always arrived safe.

safe. A servant of the plaintiff was the only witness to speak to the delivery of these two dozen. He stated, that he took them to *Harrison's Wharf*, and left them on the premises there, with a direction to the defendant, piled up among other goods; he had no receipt for them, nor was any entry respecting them made in the wharfinger's books; he saw a man upon the wharf whom he believed to be a servant of the wharfinger, but he did not know his name, and should not be able to recognize his person; he had no conversation with the wharfinger or any other person upon the premises.

1813.
 BUCKMAN
 v.
 LEVI.

It was objected, for the defendant, that here was no sufficient evidence of a delivery to charge him, as the goods had not been booked in his name at the wharf, and he would have no remedy over against the wharfinger.

On the other side, they contended, that no receipt or booking was necessary. According to *Dutton v. Solomonson*, 3 Bp. & Pul. 582, and other cases, a delivery of goods to a carrier or wharfinger is a delivery to the purchaser. The delivery of these goods on the wharf, in the presence of a person who appeared there as servant to the wharfinger, was sufficient. Goods so delivered before, had safely reached their destination; and this must be considered the established mode of dealing between the parties.

* .
 Lord ELLENBOROUGH. A delivery of goods to a carrier or wharfinger with due care and diligence, is sufficient to charge the purchaser; but he has a right

1813.

BUCKMAN

v.

LEVI.

to require, that in making this delivery due care and diligence shall be exercised by the feller. Before the defendant can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked; and no person belonging to the wharf is fixed with a privity of their being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them. The person upon the wharf when the chairs were left, might be a thief, watching for an opportunity to purloin them; the defendant therefore is not furnished with a remedy over against the wharfinger, and is not himself liable as purchaser of the goods.

Verdict for the defendant.

Park and Comyn for the plaintiff.

Garrow, A. G., for the defendant.

[Attornies, *Pope and Russell*.]

Vide Clarke v. Hutchins, 14 East, 475. Cothay v. Tute, ante, 129. Strong v. Laing, post.

BENJAMIN v. BANK OF ENGLAND.

Thursday,
June 17.

TROVER for a Bank of England note for £40.

The plaintiff, being the holder of this note, paid it in discharge of a debt to one *Jacobs*. *Jacobs* passed it to one *Phillips*, who presented it for payment at the Bank. There it was stopped, on the ground that it was one of several notes obtained by means of a forged cheque from *Glynn and Co.*, the bankers. *Phillips* thereupon threatened to arrest *Jacobs* for the £40., and this sum was paid to *Phillips* by *Benjamin*, the plaintiff.

A. paid a Bank of England note to B., who paid it to C., who presented it at the Bank, where it was stopped, on the ground that it had been fraudulently obtained from a former holder. — Held that altho' A. thereupon paid the amount of the note to C., in discharge of the debt due to him from B., A. could not maintain trover for the note against the Bank of England.

Lord ELLENBOROUGH ruled, that under these circumstances the action ought to have been brought in the name of *Phillips*, and could not be maintained by *Benjamin*, who had parted with his property in the note, and had no interest in it at the time it was stopped by the Bank.

Plaintiff nonsuited.

Park and *Andrews* for the plaintiff.

Garrow, A. G., for the defendant.

[Attornies, *Isaacs* and *Kaye*.]

Vide Goggerley v. Cuthbert, 2 N. R. 170.

Thursday,
June 17.

MORSE and others, Assignees of T. A. KERRISON, a
Bankrupt, v. WILLIAMS and others.

Where a Sum of money has been lodged with a party to indemnify him against bills of exchange he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, altho' the statute of limitations has run upon them.

MONEY had and received to recover the sum of £886. 10s. under the following circumstances :

Sir Roger Kerrison deceased, and *T. A. Kerrison*, the bankrupt, were in partnership as bankers at *Norwich*. Between the years 1784 and 1806, the defendants, who are bankers in London, accepted for them certain bills of exchange, to the amount of £886. 10s. which have never yet been taken up or presented for payment. *Sir Roger Kerrison* died the 16th June 1808, and a commission of bankrupt was sued out against *T. A. Kerrison* on the 30th of June in the same year. The defendants then having a considerable balance belonging to him in their hands, paid over the whole of it to the plaintiffs, except the sum now in dispute, which they claim to retain for the purpose of answering the outstanding bills they had accepted.

Garrow, A. G., contended, that they had no longer a right to do so, as it must be presumed that the bills were satisfied ; and, at any rate, as more than six years had elapsed since they respectively became due, the defendants were sufficiently protected by the statute of limitations.

Lord ELLENBOROUGH.—I see no ground on which I can presume that bills are satisfied which are allowed to be outstanding ; and I do not think the defendants
are

are to be driven to plead the statute of limitations to actions on their own acceptances, which they know they have never paid. They have a right to retain the money till the bills are properly accounted for, or some satisfactory arrangement is made for their indemnity.

Plaintiffs nonsuited.

Garrow, A. G. and Gurney, for the plaintiffs.

Park and Tindal for the defendants.

[Attornies, *Winch and Shawe.*]

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MORSE
and others,
Assignees of
T. A. KER-
RISON, a
Bankrupt,
v.
WILLIAMS
and others.



CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Trinity Term,

53 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

1813.

Thursday,
July 8.

HOBBS, GENT. ONE, &c. v. BRANSCOMB, DRINK-
WATER, AND OTHERS.

A peace officer may justify taking a person into custody charged with a felony, although no felony was committed.

The same rule stated to have been laid down by BULLER, J. with respect to a breach of the peace.

THIS was an action for false imprisonment, to which *Branscomb* and *Drinkwater* pleaded the general issue, and the other defendants suffered judgment by default.

The plaintiff, who is an attorney, was employed by *Mrs. Rye* to recover a legacy for her of £170. After some litigation, a meeting took place for the purpose of paying it. The executors from whom it was due then told out the money in Bank of England notes. *Mrs. Rye*, not being able to read, gave the notes to the plaintiff, that he might see they were right. He counted them over; but instead of returning them to her, put them in his pocket, saying he had a demand upon her for his bill, (which amounted to about £20.) and that he would settle with her by and by. Under the advice of the other defendants, who had suffered judgment

judgment by default, she immediately called in *Branscomb* and *Drinkwater*, who were constables, accused him of having stolen her money, and gave him in charge for the felony, desiring that they would carry him before the Lord Mayor. They accordingly took him to the Mansion House, where the notes were restored to *Mrs. Rye*.

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 HOBBS, Gent.
 one, &c.
 v.
 BRANSCOMB,
 DRINKWATER, and
 others.

Park, for the plaintiff, insisted, that the officers could not justify the imprisonment, as no felony had been committed.

Garrow, A. G. contra, cited *Samuel v. Payne*, Doug. 358. and the MS. note of a case of *Williams v. Dawson*, ruled at Nisi Prius in 1788 by Mr. Justice Buller, in which that learned Judge laid down, that "if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, there he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable."

LORD ELLENBOROUGH said, this rule appeared to be reasonable, and that very injurious consequences might follow to the public, if peace officers, who ought to receive into custody a person charged with a felony, were personally answerable, should it turn out that in point of law no felony had been committed. His Lordship therefore directed a verdict for the de-

fendants

1813.
HOBBS, Gent.
one, &c.

defendants *Branscomb* and *Drinkwater*; and the jury assessed the damages against the others at 1s.

v.
BRANSCOMB;
DRINKWATER,
and
others.

Park and *E. Lawes* for the plaintiff.

Garrow, A. G. and *Marryatt*, for the defendant.

[Attornies *Hobbs* and *Newman*.]

But if B. be arrested by mistake under a warrant against A. the keeper of a prison, to whom he is delivered, and who detains him in custody under the war-

rant, believing him to be A., is liable to an action of false imprisonment at B.'s suit. *Aaron v. Alexander*, ante, 35.

ADJOURNED SITTINGS AT WESTMINSTER.

Thursday
July 15.

WATCHORN v. LANGFORD, and others.

If a person who is not a linen draper, insures his "stock in trade, household furniture, linen, wearing apparel and plate," by a policy against fire, this will not protect linen drapery goods subsequently purchased on speculation; and the word *linen* in the policy must be confined to household linen or linen used by way of apparel.

THIS was an action on a policy of insurance, executed by the defendants as Directors of the Eagle Insurance office; whereby the plaintiff, a coach-plater and cow-keeper in Newton Street, Holborn, insured for one year, from 29th September 1811 to 29th September 1812, his "stock in trade, household furniture, linen, wearing apparel, and plate."

A fire happened in the plaintiff's premises on the 13th of August 1812, and consumed (amongst other

things)

things) a large stock of linen-draper goods, which a short time before he had purchased on speculation.

1813.
WATCHORN,
v..
LANGFORD
and others..

One item of the plaintiff's demand was for the value of these goods, which, it was contended, were protected by the policy under the denomination of "linen."

LORD ELLENBOROUGH.—I am clearly of opinion that the word "*Linen*" in the policy does not include articles of this description. Here we may apply "*notitur à fociis*." The preceding words are "*household furniture*," and the succeeding, "*wearing apparel*." The "*linen*" must be "*household linen or apparel*."

The cause was afterwards referred.

Jervis, Scarlett, and D. Pollock, for the plaintiff.

Garrow, A. G., and Park, for the defendants.

[Attornies, *Wood and Beetham*.]

Thursday,
July 15.

ELLIS v. SHIRLEY.

In an action by a bankrupt against his assignee to try the validity of the commission, if there be no notice under Sir S. Romilly's act, the proceedings are only *prima facie* evidence for the defendant, and the plaintiff may call witnesses to contradict the depositions respecting the trading, petitioning creditor's debt, or act of bankruptcy.

THIS was an action of trespass to try the validity of a commission of bankrupt which issued against the plaintiff on the petition of the defendant, and under which the defendant was chosen assignee. Plea, the general issue.

No notice was given by the plaintiff under Sir S. Romilly's act, that he meant to dispute the validity of the commission.

It was proved that the defendant as assignee, ordered the plaintiff's goods to be seized by the messenger, who took possession of them accordingly.

On the part of the defendant they put in the commission and the proceedings under it, as in *Simmonds v. Knight*, ante 251.

The plaintiff's counsel then proposed to give evidence to disprove the petitioning creditor's debt stated in the deposition on which the plaintiff was declared bankrupt.

On the other side it was contended, that by the late act of parliament, 49 G. 3. c. 121. s. 10. where no notice is given, the proceedings under the commission, if sufficient upon the face of them, are conclusive evidence of the trading, petitioning creditor's debt, and act of bankruptcy. The object of the act was to prevent the necessity of the assignees bringing evidence in support of the commission, unless they

they had previous notice that it was disputed ; and that object would be entirely frustrated if in every case the proceedings might be falsified. The assignees, to avoid being taken by surprize, must then always come prepared with witnesses to support the commission, in the same manner as before the act passed.

LORD ELLENBOROUGH.—Where no notice is given, the act makes the proceedings “ evidence to be received of the petitioning creditor’s debt, and of the trading and bankruptcy.” But I cannot give more effect to the depositions before the commissioners than to the *viva voce* testimony of witnesses adduced at the trial. The proceedings are *prima facie* evidence, but not conclusive. Where an action is brought against assignees by the bankrupt, who disputes the validity of the commission, it is not very likely they should be taken by surprize. At any rate, I am of opinion it is competent to the plaintiff to disprove the petitioning creditor’s debt.

The evidence was accordingly received, and the jury found a verdict for the plaintiff, with £20. damages.

A new trial was afterwards granted on payment of costs.

Jervis and *Marryat* for the plaintiff.

Topping and *Scarlett* for the defendant.

[Attornies, *Giles* and *Birkett*.]

Thursday,
July 15.

GREAVES v. ASHLIN.

If a written contract for the sale of goods specifies no time for delivering them, in an action for not delivering them, it is not competent for the defendant to give parol evidence that it was a condition of sale that the goods should be taken away immediately, or that by the usage of trade where goods are sold to be delivered at a distant day, the time is always mentioned in the written contract.

Although the purchaser of goods neglects, after notice, to carry them away, the seller has no right on that account to re-sell them.

THIS was an action for not delivering 50 quarters of oats sold to the plaintiff on the 16th March 1810, by the following contract, signed by the defendant's agent :

“ Sold to John Greaves 50 quarters of oats at 45s. 6d. per quarter, out of 175 quarters.
“ J. Stevenson for J. Ashlin.”

The plaintiff at the same time received a delivery order. The defendant, on the 23d March, complained to the plaintiff that the oats were not carried away, and gave notice, that if they were not carried away immediately, he should re-sell them to other persons. The plaintiff still neglecting to carry them away, the defendant re-sold them accordingly, at 51s. per quarter.

The defendant's counsel at first attempted to prove, that his agent had verbally made it a condition of the sale, that the plaintiff should take away the oats immediately, and had abated 6d. per quarter of the price originally offered, in expectation of his agreeing to do so. But —

Lord ELLENBOROUGH was of opinion, that it was not competent to the defendant to give such evidence, as it materially varied the contract, which had been reduced into writing ; and he cited *Meres v. Ansell*, 3 Will. 275. His Lordship was likewise of opinion, that a witness could not be asked, whether, according to the usage of the corn-market, if corn be sold to be delivered

delivered at a distant day, the time should not be inserted in the contract; as that was only an indirect method of giving parol evidence to vary the written contract.

1813.

GREAVES

v. v.

ASHLIN.

The defendant's counsel then insisted, that he was entitled to re-sell the oats in the manner he had done, the plaintiff not having carried them away in a reasonable time after notice. Under these circumstances, the contract might be considered as dissolved, and the property in the goods re-vested in the defendant.

LORD ELLENBOROUGH.—If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room; or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract. When a farmer sets out his tithes, and gives the parson notice to take them away, he may bring his action, if the latter does not do so within a reasonable time; but the parson's neglect does not re-vest in the farmer the property in the articles set out. In this case the notice given to fetch away the goods could not discharge the defendant from his contract, nor empower him to sell the property of the plaintiff.

The plaintiff had a verdict for the difference between the price at which he bought the oats and the sum for which they were resold.

Park and Nolan for the plaintiff.

Garrow, A. G. and Comyn for the defendant.

Vide Langfort v. Administratrix of Tyler, Salk. 112.

ADJOURNED SITTINGS AT GUILDHALL.

Wednesday,
July 28.

THOMPSON v. INGLIS and others.

Where the charterer of a ship for a voyage to Tobago and back, covenanted to load and dispatch her in time to join the convoy that should be appointed to sail from the West Indies on the 1st of August, held that he was liable for not having loaded and dispatched her by the 22d of July, the day the West India convoy passed the Island of Tobago, although he offered to load her with a complete cargo if she would stop a few days longer.

THIS was an action of covenant on a charter-party, for a voyage from *London* to *Tobago* and back; whereby the defendants covenanted to load or cause to be loaded on board the ship at *Tobago*, a full and complete cargo of produce, and to dispatch her therewith for *London*, in time to join the convoy that should be appointed to sail from the *West Indies* for *Great Britain* on the 1st of *August*.

The ship arrived at *Tobago* on the 8th of *July*, and was ready to take in the homeward cargo on the 14th. There was time to have loaded her before the 22d, when the convoy sailed from *Tobago*. On that day, only a small quantity of goods had been supplied, but an offer was made to the captain of a complete cargo if he would stop a few days longer. He refused to do so, and sailed away for *England*.

Topping, for the defendants, contended that the ship was bound to wait at *Tobago* till the 1st of *August*. If she had done so, she would have been completely loaded and dispatched on that day. Thus there had been no breach of covenant on the part of the freighters, who were prevented from loading a full cargo by the default of the captain.

Lord

LORD ELLENBOROUGH. I think the captain was at liberty to sail from Tobago on the 22d, the day when the convoy passed that island. The covenant must receive a reasonable construction. Had the ship not arrived in time to be loaded by the 22d, the case would have been different; but as she was ready to take in goods for the homeward voyage on the 14th of July, the charterers were bound to have supplied her with a full cargo before the time when the general West India convoy passed by the station where she lay. Even if the captain might have been able afterwards to have overtaken it, he was not bound to wait for the convenience of parties, as he must thereby have increased the risk of capture.

1813.
THOMPSON
v.
ENGLIS and
others.

Verdict for the amount of dead freight claimed.

Park and Carr for the plaintiff.

Topping and J. Warren for the Defendants.

[Attornies, *Falcon*, and *Gregg & Corfield*.]

HARMAN v. VAUX.

Wednesday,
July 23.

THIS was an action to recover an average loss upon a cargo of barley insured by the defendant at and from *Limerick to Oporto, Lisbon and Figueras*. The policy contained the usual memorandum, warranting corn free from average, unless general, or *the ship be stranded*.

Where there is a warranty in a policy of insurance against average, "unless general, or the ship be stranded," if during the voyage the ship is forced ashore by the wind, or is

driven on a bank, and remains fast for any time, this is a sufficient stranding to do away the effect of the warranty, although the ship is not proved to have thereby received any material damage.

1813:

HARMAN

v.

VAUX.

As the ship was proceeding down the river from *Limerick*, and was off *Scattery Island*, the wind, which was moderate, suddenly took her a-head, and she went a-shore, stern foremost. There she remained fast for two hours, till the tide flowed, when she got off and proceeded on her voyage. A witness stated that she must have strained a good deal while lying on the ground; but when she again floated it was not perceived that she had sustained any injury. On her arrival at *Oporto* the barley was found considerably damaged. She experienced stormy weather on her passage thither. The only question was, whether the ship had been *stranded* within the meaning of the memorandum.

Scarlett for the defendant, contended that it must be a stranding, from which a reasonable presumption arises that the cargo has been damaged. If there was evidence that any damage had been produced by the ship being a-ground, then it fulfilled the condition, and rendered the underwriters liable for any average loss that occurred from that or any other cause. But for this purpose it was not enough that a ship should be left dry for an hour or two on a mud bank, in a river,—a circumstance perpetually happening, without being considered a mischance. He mentioned a case lately decided in the Exchequer, in which he had been counsel, where a much stricter construction was put upon the word *stranding*. A statute provides, that goods where the ship is *stranded* or wrecked, shall not be liable to duties. A ship was cast a-shore at the mouth of the river *Mersey*, and the cargo unloaded. But because the hull of the ship

ship was not materially injured, it was held upon an information filed by the attorney general, that the goods were liable to the duties.

1813.
HARMAN
v.
VAUX.

LORD ELLENBOROUGH.—I make no doubt that was a very sound construction of a fiscal law. But I am of opinion there was here a clear stranding within the meaning of the memorandum. It is not merely touching the ground that constitutes a stranding. If the ship touches and runs, the circumstance is not to be regarded. There she is never in a quiescent state. But if she is forced ashore, or is driven on a bank, and remains for any time upon the ground, this is a stranding, without reference to the degree of damage she thereby sustains. To remove all doubt upon the question, this clause is introduced. The stranding is a condition precedent, and when that is fulfilled the warranty against particular average ceases to have any operation.

The plaintiff recovered the amount of his demand.

Park and Marryat for the plaintiff.

Scarlett and Storke for the defendant.

[Attornies, Cannon and Miller]

So a ship having run on some wooden piles four feet under water, erected about nine yards from the shore to keep up the banks of the river; and having lain on these piles till they were cut away;—this was held to be a stranding within the meaning of the memorandum. *Dobson*

v. Bolton, Marsh. 239. But it was decided that there had been no such stranding, where a ship in the river Thames was run foul of by two other vessels, and being thereby driven aground, remained fast for an hour. *Baring v. Henkle*, Marsh, 240.

Wednesday,
July 28.

REX v. VERELST, Esq.

Upon an indictment for perjury before a surrogate in the ecclesiastical court, the fact of the person who administered the oath having acted as a surrogate is sufficient *prima facie* evidence of his being duly appointed and having authority to administer the oath.

But if it appear that the surrogate was appointed contrary to the canon which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf, his appointment is a nullity, and the averment that he had authority to administer the oath is negatived.

THIS was an indictment for perjury in an answer to an *allegation* in the ecclesiastical court. The indictment stated that on the 2d day of December 1811, a certain *allegation* was exhibited in the consistorial and episcopal court of London, before the worshipful *Samuel Pearce Parson*, doctor of laws and surrogate of the Right Honourable Sir Wm. Scott knight, doctor of laws, vicar general of the Right Reverend Father in God the Lord Bishop of London, and official principal of his consistorial and episcopal court of London, by and on the part and behalf of *Elizabeth Amelia Verelst*, wife of the defendant, in a certain cause then depending, and before them instituted in the said court by the said defendant, for the purpose of procuring a divorce and separation from bed, board and mutual co-habitation with his said wife by reason of adultery. Mrs. *Verelst's allegation*, imputing adultery to the defendant, was then set out. The indictment proceeded afterwards to aver, that the said allegation was admitted by the said court, and that the defendant on the 12th July 1812 came in person before the said *Samuel Pearce Parson* surrogate as aforesaid, and was sworn and took his corporal oath before him, that his answer to the matters in the said *allegation* should contain the truth, the whole truth, and nothing but the truth, without favour or affection to his own cause, the said *Samuel Pearce Parson* having competent authority to administer the said oath; and that

that the said defendant upon his oath exhibited as true his answer in writing to the matters contained in the said *allegation*. A part of the answer was then set forth, upon which the assignments of perjury were framed. Plea, not guilty.

1813.
Rex
v.
VERELST.

The original answer was put in, which had been sworn to by the defendant before Dr. *Parson*, as surrogate of Sir WM. SCOTT, and it was proved that Dr. *Parson* had been in the habit of acting in that capacity.

The defendant's counsel objected that evidence was necessary of Dr. *Parson's* appointment; otherwise, the averment would not be supported that he had competent authority to administer the oath. Credit is given to the judges and magistrates of the common law, that they are duly appointed to the offices in which they act, but this has never been extended to the ecclesiastical courts, which are not courts of record, and which have always been looked to with peculiar jealousy.

LORD ELLENBOROUGH.—I think the fact of Dr. *Parson* having acted as surrogate, is sufficient *prima facie* evidence that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the ecclesiastical courts and other jurisdictions. It is a general presumption of law that a person acting in a public capacity is duly authorized so to do. (a)

(a) *Vide Rex v. Jones*, 2 Campb. 131.

1813.

REX

v.

VERELST.

The defendant's counsel then put in the registrar's book, containing Dr. *Parson's* appointment by Sir Wm. Scott. This entry was in the hand-writing of one *Grojan*, the registrar's clerk; and bore date 14th May 1793. The appointment was in the common form of an act of court; but instead of being authenticated in the usual manner, was stated to have taken place, "*Present Notary Public.*" There was not the name of any notary mentioned, and neither the registrar nor his deputy had been present at the time. Parol evidence was given, that by the practice of the ecclesiastical courts, a notary public, or some higher officer, should be present at every act of court for the purpose of authenticating it. In confirmation of this, *Can. 122* was cited, whereby it is declared, that "No chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall speed any judicial act either of contentious or voluntary jurisdiction, except he have the ordinary register of that court, or his lawful deputy; or if he or they will not or cannot be present, then such persons as by law are allowed in that behalf, to write or speed the same, under pain of suspension, ipso facto." Upon which *Gibson* observes, "And this is according to the rule of the antient canon law; which, to prevent falsifications, requireth the acts to be written by some public person (if he may be had) or else by two other credible persons, and the credit which the canon law gives to a notary public is, that his testimony shall be equal to that of two witnesses." *Gibb. 996. 3 Burn. Eccl. Law 285.* It was argued that on these grounds Dr. *Parson's* appointment was a nullity, and that he had no authority to administer the oath.

The counsel for the prosecution contended, that Dr. *Parson* having acted as surrogate for twenty years without his authority being questioned in the ecclesiastical court, a judge and jury at nisi prius ought not to inquire into the manner of his appointment; that if they did, they might still presume a notary was present, although a blank was left for the name in the entry; that the entry was not the appointment, but only the evidence of it; that the appointment might be regular although the entry was deficient; and that even if no notary was present, it did not follow that the appointment was a nullity, although the judge might be liable to suspension.

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 v.
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LORD ELLENBOROUGH.—I cannot shut out evidence that Dr. *Parson* was not duly appointed a surrogate, however long he may have acted in that capacity. The presumption arising from his acting, only stands till the contrary is proved.—The canon requires that every act either of contentious or voluntary jurisdiction shall take place in the presence of the register or his deputy, or such other person as is by law allowed in that behalf. The appointment of a surrogate is an act of voluntary jurisdiction. To be valid, it ought therefore to take place in the presence of the register, or his deputy, or such other person as is by law allowed in that behalf, that is to say, of a notary public. But Dr. *Parson's* supposed appointment did not take place either in the presence of the register, or his deputy, or of a notary public. I must judge of the manner in which it took place by the entry which records it. That entry leaves a blank for the name of a notary public. This affords evidence that a notary public was the officer meant to authenticate

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 Rex
 v.
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authenticate the act, but that no one attended. I am therefore of opinion, that the allegation that Dr. *Parson* had competent authority to administer the oath is negatived. Such authority would have been conferred by an appointment according to the canon, in the presence of the register or his deputy, or a notary public. An appointment contrary to the canon, where no such person was present, I must treat as a nullity.

The Defendant was thereupon acquitted.

Scarlett and *Bolland* for the prosecution.

Park, *Topping*, *Gurney*, and *Alley* for the Defendant.

[Attornies *Clarke* and *Harmer*.]

" It seemeth clear that no
 " oath whatsoever taken before
 " those who take upon them to
 " administer justice by virtue of
 " an authority seemingly co-
 " lourable, but in truth un-
 " warranted and merely void,
 " can ever amount to perjury
 " in the eye of the law : And
 " from the same ground it
 " seemeth also clearly to follow,
 " that no false oath in an affi-

" davit made before persons
 " falsely pretending to be au-
 " thorized by a court of justice
 " to take affidavits, in relation
 " to matters depending before
 " such court, can properly be
 " called perjury, because no af-
 " fidavit is any way regarded,
 " unless it be made before per-
 " sons legally intrusted with a
 " power to take it." 1 Hawk.
 P. C. c. 69. f. 4.

INGLIS v. VAUX.

Thursday,
July 29.

THIS was an action on a policy of insurance on the ship *Speculation*, at and from Liverpool to Martinique, and all or any of the Windward and Leeward Islands, with liberty to touch at any ports or places whatsoever, to take on board and land goods, stores, &c."

The ship sailed from *Liverpool* on the 13th March 1811, and arrived at *Martinique* about the 20th May following. There the captain disposed of all his outward cargo, except a small quantity of lime and bricks. With these he sailed for *Antigua*, where he arrived on the 31st of the same month. Here the ship lay till the 8th of July, when she was wrecked in a hurricane, with the lime and bricks still on board. The captain had not been able in the meanwhile to obtain a freight home; and being now examined as a witness, he stated that he stopped at *Antigua* partly to dispose of the outward cargo, and partly to procure a homeward cargo.

Where a ship insured to Martinique and all or any of the windward and leeward islands, landed the greatest part of her cargo at Martinique, and sailed with the residue to Antigua, where she was wrecked while stopping partly to dispose of the residue of the outward cargo, and partly to obtain a homeward cargo, *held* that the underwriters were not liable.

The plaintiff's counsel contended, that the underwriters continued liable on the policy at the time of the loss, as the outward adventure was not then completed. There being no market for the lime and bricks at *Antigua*, the ship had a right to sail, under the protection of the insurance, to any of the other windward or leeward islands, so that she took them in geographical order, and according to the common course of navigation.

Lord

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INGLIS

v.

VAUX.

LORD ELLENBOROUGH.—The captain had no right to mix up together the two objects, of disposing of the remnant of the outward cargo, and procuring a home-ward cargo, at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceased to be the sole reason for his stay at *Antigua*, these underwriters were discharged.

Verdict for the Defendant.

Park, Carr, and Erskine for the plaintiff.

Scarlett and Storks for the defendant.

[Attornies, *Gregg and Mills*.]

Vide Emerig. tom. 1. p. 72. acc.

Thursday,
July 29.

COWLEY v. WM. ROBERTSON and MARY his Wife.

Under a plea of the general issue to an action of assumpsit against husband and wife for goods sold to the wife before the marriage, it is competent to prove that she was then married to another husband who is still alive.

INDEBITATUS assumpsit for goods sold and delivered to the wife before her intermarriage with the defendant *Wm. Robertson*, which she promised to pay for. Plea, non assumpsit.

It was proved that the goods were sold and delivered to the defendant *Mary*, before her intermarriage with *Wm. Robertson*, and while she was living as the widow of one *Matthew Tittery Gilley*.

Park

Park for the defendants proposed to prove that this *Matthew Tittery Gilley* was then and still is alive.

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COWLEY
v.
WM. ROBERTSON and
MARY his
Wife.

Topping, contra, maintained that this was not competent evidence under the general issue, and that bigamy could not be set up as a defence to the action.

LORD ELLENBOROUGH. The defendant *Mary* did not undertake in manner and form, if she had a husband then alive. By law, she was incompetent to enter into any contract; the previous coverture therefore, supports the general issue. Nor do I think there is any estoppel to prevent the defendants from giving it in evidence. The plea, as framed, is no acknowledgment that they are husband and wife. They are only connected on the record by being sued jointly. Although she should have married a second time, her former husband being still alive, it does not necessarily follow that she was guilty of a crime for which she is liable to punishment.

It was proved that she was married to *M. T. Gilley* on the 24th Dec. 1791; that he soon afterwards went to *Barbadoes*; that for several years no accounts of him were received; that in 1805 she and his family, believing him to be dead, went into mourning for him; that on the 3d July 1808 she married the defendant *Robertson*; and that since the commencement of the action a letter has been received from *Gilley*, stating, that after many strange adventures he had returned to *Barbadoes*, and making anxious enquiries after his wife and child.

The Plaintiff submitted to be nonsuited.

Topping

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1813.

Topping and Gurney for the Plaintiff.

Park and Marryat for the Defendants.

**Wm. ROBERTSON and
MARY his
Wife.**

[Attornies, *Sweet and Spence.*]

Thursday,
July 29.

ANDERSON v. WALLIS.

Where goods were insured "at and from London to Quebec, warranted free of particular average," and the ship was driven back from the banks of Newfoundland and obliged to put into Kinsale, where it was impossible to repair her so as to enable her to complete the voyage the same season, and the goods, which though not of a perishable nature were to a certain degree damaged, could not be forwarded the same season by any other conveyance;—*held* that the assured could not by giving notice of abandonment come upon the underwriters for a total loss.

POLICY on goods at and from London to Quebec, warranted free of particular average.

The ship sailed on the 16th September 1811. She met with stormy weather off the Banks of Newfoundland which drove her back, and she was obliged to put into Kinsale on the 25th of October. It was impossible to repair her so as to complete the voyage that season, or to forward the cargo by any other ship. The goods insured consisting of iron, copper and nails, were found in some degree damaged by the salt water. The assured gave regular notice of abandonment.

LORD ELLENBOROUGH.—I conceive the mere loss of the voyage would not have been sufficient to entitle the assured to abandon. If the goods had suffered no damage, and not being of a perishable nature might have been kept and forwarded to Quebec in a sound state the following spring, I do not see on what ground it could have been said they were totally lost, or that this loss should be thrown upon the underwriters. However, it may be fit that the effect

of the goods being to a certain degree damaged should be further considered; and on that ground the plaintiff may take a verdict, with liberty for the defendant to move to enter a nonsuit.

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ANDERSON
v.
WALLIS.

Accordingly, the case was afterwards brought before the court; when Lord ELLENBOROUGH agreed with the other judges, that the assured had not a right to abandon, and that the loss not being total, the assured had no right to recover.

•
• Nonsuit entered.

Park, Carr and Wyld, for the plaintiff.

Topping and Richardson for the defendant.

[Attorneys, *Wilde and Willis*]

Vide Wilson v. Royal Exchange Ass. Co 2 Campb. 623.

PATRICK v. EAMES.

Saturday,
July 31.

THIS was an action on a policy of insurance on the freight of the ship *Jane*, valued at £4,000. at and from the ship's port or ports of loading in all or any of the *Cape de Verd Islands*, to *Liverpool*.

Where there is a valued policy on freight, and the ship is lost while taking in her cargo, the assured can only recover for the freight of the

goods actually on board, unless a full cargo be then provided for her, or there be a contract either written or parol to supply one.

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PATRICK
v.
JAMES.

The Jane was purchased at Sierra Leone by Messrs. Taylor and Waldron, in whom the interest was averred. Their plan was, that she should take in a complete cargo of *orchella weed*, a plant picked from the rocks in the Cape de Verd Islands. They expected that this would be supplied by Don Emanuel Martinus, the governor. It was suggested that he had verbally undertaken to do so; but there was no evidence adduced of any binding agreement upon the subject. The ship arrived at St. Nicholas, one of the Cape de Verds, on the 10th August 1812, and took in 150 bags of orchella weed. The next day, a storm came on, and she was totally wrecked. It did not appear that there was more orchella weed then ready to be put on board; but there were persons employed in St. Nicholas and the other islands to pick and prepare what should be a sufficient quantity to fill the ship.

The defendant paid into court a sufficient sum to cover the freight of the 150 bags of orchella weed on board when the ship was wrecked, and the return of premium for short interest.

Park, for the assured, contended, on the authority of *Montgomery v. Eggington*, 3 T. R. 362. that they were entitled to recover for a total loss.

LORD ELLENBOROUGH.—If a contract had been proved for supplying this ship with a full cargo at a stipulated rate of freight, it would have appeared that, by the event which has happened, the assured have been deprived of a profit which they must other-

wife have certainly received ; and they would have had a right to resort to the underwriters for a full indemnity. Nor should I have considered it material whether that contract was or was not under seal, or whether it was written, or merely verbal. This circumstance only varies the mode of proof, without altering the principle on which the rights of the parties depend. But here no contract of any sort is proved for loading the ship. Beyond the 150 bags of orchella weed actually on board, the interest of the assured was merely in expectation. For any thing that appears, Don Emanuel Martinus might have refused to send on board another bag, without subjecting himself to an action ; and although the storm had never arisen, the ship might have been obliged to return to Liverpool nearly empty. The loss of freight which the assured now demand, therefore, did not necessarily arise from the event against which the underwriters undertook to indemnify them.

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L PATRICK
v. .
EAMES.

Plaintiff nonsuited.

Park, Scarlett, and Littledale, for the plaintiff.

Topping, Murryat, and Campbell, for the defendant.

[Attorneys, *Do u and Blunt*]

Vide Forbes v. Aspinall, 13 East, 323. *Forbes v. Cowie*,
1 Campb. 520.

OXFORD CIRCUIT.

SUMMER ASSIZES, 53 GEORGE III.

STAFFORD.

CROWN SIDE. Coram DAMPIER, J.

1813.

Monday,
Aug. 9.

REX v. COTTON.

Upon the trial of an indictment for not repairing a highway, which it is alleged the defendant is bound to repair *ratione tenuræ*, an award made under a submission by a former tenant for years of the premises can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *propter hunc motum*.

THIS was an indictment for not repairing a highway in the township of Alveton, in the county of Stafford, which it was alleged that the defendant was bound to repair by reason of his tenure and occupation of a certain farm and lands called *Netherfield Farm*, situate in the said township. Plea, *Not Guilty*.

The question was, whether the tenant and occupier of *Netherfield Farm* was bound to repair this road, or the obligation lay on the township at large?

The counsel for the prosecution offered as conclusive evidence a bond, executed in the year 1754 by the then occupier of *Netherfield Farm*, who held it as tenant to Lord Shrewsbury, conditioned to abide by the award of *J. Gilbert Esquire*, a neighbouring magistrate, now deceased, on this very question; and the award of *Mr. Gilbert* made thereupon, determin-

ing that the tenant and occupier of *Netherfield Farm*, and not the township, was bound to keep the road in repair.—But,

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 ———
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 COTTON.

DAMPIER, J. was clearly of opinion, that the bond could not be received in evidence at all, as the tenant had no right to bind his landlord; and that he could not receive the other document as *an award*, whatever effect it might have as evidence of *reputation*.

Abbott, for the defendant, then objected, that it was not admissible as evidence of reputation, being *post litem motam*, and cited the *Berkeley Peerage Case* before the House of Lords, in which it was decided, that no declaration could be given in evidence which had been made after the controversy on the question at issue had arisen.

Peake, *contra*, insisted that as Mr. *Gilbert* was no party to the dispute, and had no interest in it, his award was evidence of reputation. It amounted to a declaration by him of the reputation in the township before the dispute arose. If by word of mouth or in a letter to a friend he had expressed his opinion upon the reputed liability to repair the road, that might surely have been given in evidence, and his declaration cannot be less receivable because it is on parchment and under seal.

Dampier, J. This is a question of considerable importance and of some novelty. I wish that my opinion upon it could be reviewed; but in the manner in which it arises, that is impossible; and I must dispose of it at

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once in the best manner I can. I have certainly had the advantage of hearing it ably argued on both sides. The award must either be received as an adjudication or as evidence of reputation. I have already said I cannot receive it as an adjudication, for it could only be binding on the individual who was a party to the submission, and could not affect Lord Shrewsbury, who was seized in fee of the premises, or any person subsequently holding under him. I am likewise of opinion that it is not admissible as evidence of reputation. The reason why the declarations of deceased persons upon public rights made *ante litem motam*, when there was no existing dispute respecting them, is, that these declarations are considered as disinterested, dispassionate, and made without any intention to serve a cause, or to mislead posterity. But the case is entirely altered *post litem motam*, when a controversy has arisen respecting the point to which the declarations apply. Declarations then made are so likely to be produced by interest, prejudice or passion, that no reliance can safely be placed upon them, and they would more frequently impose upon the understanding than conduce to the elucidation of truth. It has therefore been wisely decided, that evidence of reputation arising *post litem motam* shall not be admitted.—Was there not *lis mota* at the time this award was executed by Mr. Gilbert? The very submission to him shews, that the question was then agitated between the township of Alveton and the occupier of Netherfield Farm; which of them was bound to repair this highway? What deceased witnesses then stated to the arbitrator, would not be receivable; and his opinion formed upon that, and expressed in his award, cannot be entitled to more credit.

The

The defendant had a verdict.

Peake and Barnes for the prosecution.

Abbott and Petit for the defendant.

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v.

COTTON.

SHREWSBURY.

Coram DAMPIER J.

DOE d. MORGAN, Clerk, v. BLUCK.

Friday,
Aug. 18.

THIS was an ejectment brought by the rector of the parish of Tugford, to recover possession of the glebe lands of the said parish, against a person who had held them as his tenant from year to year. The demise was laid on the 1st of Jan. 1813.

A *prima facie* case was made for the lessor of the plaintiff, by proving a receipt for rent to Christmas 1812, and a notice to quit at that time served on the defendant the 18th of June preceding.

The defence was, that the rector was not in a situation to maintain this ejectment, on account of a sequestration of the living, and the proceedings thereupon.

Where a notice to quit, given by a rector to the tenant of his glebe land expired on the 25th of Dec. and on the 17th of Jan. following a sequestration was read in the church, and the rector afterwards by order of the sequestrator, received from the tenant, who held over, a weekly allowance, which he described in a receipt as issuing out of the tithe and glebe;—held that the rector might still maintain an ejectment, laying the demise on the

1st of Jan. as between the 25th of Dec. and the 17th of Jan. the tenant was a trespasser.

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 Doe d. MOR-
 GAN Clerk,
 v.
 BLUCK.

The judgement on which the sequestration was founded was not proved; but the defendant gave in evidence a writ of *levari facias*, directed to the bishop of Hereford, tested the 28th Nov. 1812, the last day of Michaelmas term. On the 28th Dec. following, this was indorsed by the bishop, "Let sequestration issue." The sequestration, directed to one Watkins, did issue the 3d January 1813, and was read in the parish church on the 17th of the same month.

In February a meeting of the parishioners took place, at which the defendant was present, to consider how they were to pay their tithes, &c.—and two persons were deputed to speak upon that subject to the rector. He referred them to Watkins the sequestrator. Watkins desired that the defendant, who occupied a farm in the parish, should pay the rector a guinea and a half a week for serving the cure, but gave no other directions with respect to the tithes or glebe land, or (as far as appeared) at all intermeddled with the affairs of the living. The defendant paid the rector the weekly allowance of a guinea and a half; for which, in July, the latter gave a written receipt, as issuing out of the tithe and glebe. An offer had been made a short time before the trial, to pay the money for which the sequestration issued.

Dauncey and *Abbott* contended, that under these circumstances the ejectment could not be supported. By the issuing of the sequestration the rights of the rector were completely suspended. The sequestrator and not the rector was entitled to the possession of the glebe

glebe lands, as well as to the receipt of the tithes. Besides, by the voluntary act of the rector himself, he had waived the notice to quit, and affirmed the tenancy. The guinea and a half a week was tantamount to the payment of rent, and it was expressed to be for the rent of the glebe land in the written receipt signed by the rector himself. It is clear that he is not now entitled to the possession of the glebe land; and even supposing that there was a short interval after the expiration of the notice to quit when the defendant might be considered as a trespasser, he ceased to be so when the sequestration had taken full effect, and he was now entitled to retain possession of the premises. A writ of *habere facias possessionem* therefore can no longer be sued out, and the ejectment cannot be supported.

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Doe d. MOR-
GAN Clerk,
v.
BLUCK.

DAMPIER, J. The sequestration did not take effect till the 17th of January, when it was read in the parish church. The notice to quit expired on the 25th of December. Between these two days the defendant was a trespasser. I think the rector is not now entitled to the possession of the glebe lands, and that he cannot sue out a writ of *habere facias possessionem* in this action. Regularly, the judgement on which the sequestration issued should have been produced; but the necessity for that is obviated by the rector's recognition of the validity of the sequestration, and that recognition refers back to the 17th of January, when it was published in the church. From that day he is not entitled to the rents and profits of the glebe lands, while the sequestration remains in force; but he is entitled to such

1813.

DORRIS MOR-
GAN, Clerk,

BLUCK:

such rents and profits down to that time from the expiration of the notice to quit. For this reason I think the ejectment maintainable. The present is like the case of tenant for life dying pending an ejectment. Possession is not to be recovered, but the ejectment is the medium through which the party may recover the mesne profits of the lands.

The lessor of the plaintiff had a verdict.

IN the ensuing term, *Abbott* moved the court of K.B. for a rule to shew cause why the verdict should not be set aside and a new trial granted; or why the lessor of the plaintiff should not be restrained from taking out execution upon the judgement. But the court fully approved of the direction given by the learned judge at Nisi Prius; and said, it would be time enough to consider in what shape the lessor of the plaintiff was entitled to execution when it appeared that he meant to disturb the possession of the defendant.

Rule refused.

Jervis and *Campbell* for the lessor of the plaintiff.

Dauncey and *Abbott* for the defendant.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

54 GEORGE III.

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

DENEW v. DAVERELL, Esq.

Tuesday,
Nov. 30.

ACTION for work and labour, money paid, &c.

The plaintiff, who is an auctioneer, was employed by the defendant, a gentleman of fortune, to sell for him a leasehold house in Grosvenor-street. The plaintiff advertised the house, and made out a particular of the conditions of sale, which was submitted to the defendant, and which he approved of. This did not contain any proviso that the vendor was not to be called upon to shew the title of the lessor. The lease of the house was bought upon this particular by Lord Bolton, who immediately called upon Mr. Daverell to shew that Lord Grosvenor, the lessor, had power to grant the lease. A bill being filed for a specific performance, the Chancellor held, that the vendor, without an express stipulation to the contrary, was bound to shew

If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor.

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 v.
 DAVERELL,
 Esq.

shew the title of the lessor, and Mr. Denew was not in a situation to do so. Lord Bolton accordingly brought an action against the auctioneer, and recovered back his deposit. The amount of the damages and costs in that action was now paid into court. The plaintiff sought to recover farther two and a half per cent. commission upon the sum for which the lease was sold to Lord Bolton.

The defence was, the plaintiff's negligence in conducting the sale; and several witnesses were called, who stated that it has been the constant usage of auctioneers, for a number of years, when employed to sell leasehold property, to insert a proviso in the particular, that the vendor shall not be called upon to shew the title of the landlord.

Garrow, A. G. for the plaintiff, insisted this was no defence to the action,—more especially as the defendant himself had seen and approved of the particular under which the house was sold.

LORD ELLENBOROUGH. Where there is a special contract for a stipulated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross action for any negligence he complains of. But where the plaintiff proceeds, as here, upon a quantum meruit, I have no doubt that the just value of his services may be appreciated, and that if they are found to have been wholly abortive, he is entitled to recover no compensation. In the present case, the plaintiff appears to have been guilty of gross negligence, and the defendant has suffered an injury

injury instead of deriving any benefit from employing him. A practice has very properly sprung up among auctioneers in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called upon to shew the title of the lessor. The plaintiff was bound to take notice of that practice, and to insert such a clause in the particulars of sale of the defendant's house. Had this been done, the defendant would have been secure, and Lord Bolton must have completed the purchase. By the omission, the defendant has the house thrown back upon his hands with expensive litigation. It is no answer that the particulars were shewn to him, and that he made no objection to them. I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness he leads me into mischief, he cannot ask for a recompence, although from a misplaced confidence I followed his advice without remonstrance or suspicion.

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DENEW
v.
DAVERELL,
Esq.

The Jury found a verdict for the defendant.

Garrow, A. G. and *Comyn*, for the plaintiff.

Topping and *Bowen* for the defendant.

[Attornies, *Grenwell* and *Strong*.]

Vide Farnsworth v. Garrard, 1 Campb. 38.

Tuesday,
Nov. 30.

GREGORY v. FRASER.

Although a promissory-note without a stamp cannot be received in evidence as a security, or to prove the loan of money, it may be looked at by the jury with a view to ascertain a collateral fact.

THIS was an action for money lent.

The witnesses for the plaintiff, who keeps a billiard table, stated, that on the evening of the 25th of May last he lent £40. to the defendant, who gave a promissory note for the amount on an unstamped piece of paper, which was produced by the plaintiff.

The defendant's case was, that he had been made drunk by the plaintiff, and induced to write a promissory note for £40., no part of which sum he had received.

LORD ELLENBOROUGH.—The note certainly cannot be received in evidence as a security, or to prove the loan of the money; but I think it may be looked at by the jury as a cotemporary writing to prove or disprove the fraud imputed to the plaintiff.

The note was accordingly put in, and had very much the appearance of being written by a man in a state of intoxication.

The jury found a verdict for the defendant.

Park and Comyn for the plaintiff.

Garrow, A. G. and Adam, for the defendant:

[Attornies, *Boot and Hoare*.]

Vide *Rex v. Pendleton*, 15 East, 449. *Morton's Case*, 2 East, P. C. 955.

HUNTER v. BRITTS.

Friday,
Dec. 3.

TRESPASS for mesne profits and costs of ejectment.

There was judgement in ejectment against the casual ejector. The defendant was landlord of the premises, and proved to have been in the receipt of the rents and profits from the time of the demise till the writ of possession was executed. The ejectment was served upon the tenant. There was no evidence that the defendant had notice of this till after judgement; but subsequently to that he promised to pay the rent and the costs to the plaintiff.

Where premises are in the possession of a tenant, and there is judgement in ejectment against the casual ejector, in an action for mesne profits and costs of ejectment against the landlord, the judgement in ejectment is no evidence against him, without proof that he had notice of the ejectment, so that he might have come in to defend it; but a subsequent promise by him to pay the rent and costs amounts to an admission that he is liable to the action.

Marryat for the defendant contended, That upon this proof the action could not be maintained. The judgement in ejectment was evidence of title only between those who were privy to it. But the defendant's name not only did not appear on that record, but he was wholly ignorant of the proceeding till after judgement was signed. He might have had an undoubted title to the premises, and might have been able to make a complete defence to the ejectment if he had had the opportunity. He could not be bound, therefore, by the judgement in ejectment which was obtained behind his back. His subsequent promise might render him liable in assumpsit; but could not have the effect of making him a trespasser.

Lord ELLENBOROUGH thought that the judgement in ejectment was not evidence of title against the defendant

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 HUNTER
 v.
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defendant without notice of the ejectment; but that his subsequent promise amounted to an admission that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser.

Verdict for plaintiff.

Park and *Reader* for the plaintiff.

Marryat for the defendant.

Vide Bull. N. P. 87. Dunn v. White, 7 T. R. 112.

Saturday,
 Dec. 4.

SMITH v. FUGE the Younger.

In an action against the owner of a ship for stores supplied to her, the register purporting to be granted on the oath of the defendant, and stating him to be sole owner, is no evidence of ownership.

THIS was an action for seaman's wages against the defendant as owner of the ship *Enterprise*.

To prove the ownership, the register was put in, which stated "*Robert Fuge, the younger, of Plymouth*" to be sole owner; and evidence was given that *Robert Fuge, the younger, of Plymouth*, was the defendant in this action.

Garrow, A. G., attempted to distinguish this case from *Tinkler v. Walpole, 14 East, 226.* as here the register represented the defendant as sole owner, and purported to be granted upon his own oath.

LORD ELLENBOROUGH.—The defendant cannot be charged through the medium of the register without direct proof that he took the oath, or adopted the character of owner. I have no doubt in my own mind,
 that

that he did take the oath, and that he is sole owner of the vessel; but for any thing that appears in evidence, he has no connection with her whatsoever; and a stranger may have taken the oath in his name.

1813.
Surrey
v.
Fooks
the younger.

Plaintiff nonsuited.

Garrow A. G. and Marryat for the plaintiff.

Park and Taddy for the defendant.

Vide Flower v. Young, ante, 240.

HARRISON v. BLADES and another.

Monday,
Dec. 6.

THIS was an action against the sheriff of Middlesex for breaking and entering the plaintiff's house and taking his goods.

It is no sufficient ground for receiving evidence of the handwriting of a witness which would be receivable if he were dead, that he is unable to attend the trial from indisposition, and lies without hopes of recovery.

To prove that the plaintiff was in possession of the house, he wished to give evidence that he paid the taxes for it. For this purpose the tax-gatherer had attended under a subpœna during the sittings till Saturday last, when he was seized with an apoplectic fit, and carried home in a very dangerous state. Witnesses were now examined, who swore, that when they left him this morning, he was given over by his physicians, and that he was *in extremis*.

Garrow, A. G., for the plaintiff, proposed, under these circumstances, to give in evidence the tax-gatherer's

1813.
 {
 HARRISON
 v.
 BLADES
 and another.

therer's receipts, signed with his name, acknowledging that the taxes had been paid to him by the plaintiff as occupier of the house in question. If the tax-gatherer were dead, these documents would clearly be evidence, as they charged him with the receipt of money, and were against his interest. So they would be equally admissible if he were in a foreign country, or in a state of mental derangement. Upon the same principle they ought to be admitted in a case like this, where the attendance of the witness was physically impossible, and there was no chance of ever being able to examine him in person on any subsequent occasion.

Lord ELLENBOROUGH.—I cannot dispense with the attendance of a witness who is still alive and within the jurisdiction of the court, so as to admit evidence of his hand-writing in the same manner as if he were actually dead: No case has yet gone so far, and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hope of cure. If such a relaxation of the rules of evidence were permitted, there would be very sudden indispositions and recoveries. Where a witness is taken ill, the party who would avail himself of his testimony must move to put off the trial. If he be in a very dangerous condition, he will probably be dead before the ensuing sittings, and then evidence of his hand-writing may be received without any risk of collusion.

The plaintiff had a verdict.

Garrow, A. G., and Espinasse for the plaintiff.

Park and Holt for the defendants.

[Attorneys, *Kist and Smith*]

CARTER

 ADJOURNED SITTINGS IN LONDON.

CARTER v. RING, Widow, Administratrix of
JOSEPH RING, deceased.

Thursday,
Dec. 3.

DEBT on bond, dated 1st July 1807, in the penal sum of £3,800. to be paid by the said Joseph Ring to the plaintiff, when he the said Joseph Ring should be thereunto afterwards requested.

Where to debt on bond conditioned for the payment of a sum of money on demand, the defendant pleads that no demand was made, upon which issue is joined, the plaintiff must prove an express demand before action brought.

The bond had the following condition: "If the above-bonded Joseph Ring, his heirs, executors, or administrators, do well and truly pay or cause to be paid to the above-named Henry Carter, his executors, administrators, or assigns, the full sum of £1,900. of lawful money current in Great Britain, *on demand*, with lawful interest at the rate of 5 per cent. per annum until paid, then, &c."

The defendant after Oyer, pleaded that no demand of payment of the said sum of money in the said condition mentioned, or of any interest thereupon, was ever made by the plaintiff.—The plaintiff in his replication averred, that a demand was made by him upon the defendant as administratrix. Issue thereupon.

The question having arisen, whether express evidence of a demand was necessary,

1813.

CARTER

v.

RING.

Jervis, for the plaintiff, insisted, that the bringing of the action was a sufficient demand.

Abbott, contra.—The bond must have been forfeited before action brought, and it could not have been forfeited till demand made of the sum of money mentioned in the condition. The stipulation as to the payment of interest clearly shews that the bond was not to be forfeited till default upon an actual demand. The plaintiff here seeks to recover the penalty, which is a collateral sum, and the cases with regard to payment of money on request, where there is an antecedent duty, do not apply.

Lord ELLENBOROUGH was of opinion, that the plaintiff was bound to prove a demand before action brought.

A witness was afterwards found who did so, and the plaintiff had a verdict.

Jervis and *Espinasse* for the plaintiff.

Abbott for the defendant.

[Attornies, *Bigg* and *Vizard*.]

SMITH v. CAREY.

Thursday,
Dec 9.**A**CTION for slander of plaintiff in his trade.

The words were, that "he lived by swindling and robbing the public." These were laid differently in different counts of the declaration; but in each count there was an innuendo, that the defendant thereby meant "that the plaintiff had been and was guilty of *felony and robbery*."

In an action for words which may be understood to convey a charge either of felony or fraud; altho' they would be actionable in the latter sense as well as the former, if the declaration contains an innuendo that the defendant thereby meant to impute felony to the plaintiff, this may be proved, and must be made out in evidence.

The words were proved as laid; but appeared to allude to a transaction, from which it might be inferred that the defendant only meant to charge the plaintiff with *a fraud*.

LORD ELLENBOROUGH said, the words were in themselves actionable, and if there had been no such innuendo as to their meaning, the plaintiff would certainly have been entitled to a verdict; but the plaintiff was bound to shew they were spoken in the sense he had ascribed to them; and if the jury should be satisfied they were spoken with intent to impute, not felony, but merely fraud, there must be a

Verdict for the defendant.

Topping and Marryat for the plaintiff.*Garrow*, A. G. for the defendant.[Attornies, *M^r Michael and Sandford*]

Vide Oldham v. Peake, 2 Bl. Rep. 959. Penfold v. Westcote, 2 New Rep. 335.

Friday,
Dec. 10.

TYE v. FYNMORE.

Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description, it is not material for the vendor to shew that they correspond with a sample exhibited at the time of sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract.

THIS was an action for not accepting or paying for a quantity of *sassafras*, described in the sale note as “2 tons of fair merchantable *sassafras* wood, in logs, at 6 guineas *per cwt.*”

The defence was, that the *sassafras* was not of the sort the purchaser had a right to expect from the description in the sale note; that by “*sassafras wood*” the roots of the tree are understood in the trade; but that the wood sold by the plaintiff was part of the timber, which cannot be applied to the same purposes, and is not above one-sixth part of the value of the roots.

In answer to this it was proved, that the defendant is a druggist, and well skilled in articles of this sort; that the day before the contract was entered into, a specimen of the wood sold was exhibited to him; that he kept it the following night, and that he had a full opportunity to examine it.

LORD ELLENBOROUGH.—This is not a sale by sample. It is not enough for the plaintiff to prove that the wood corresponds in quality with the specimen exhibited to the defendant before the sale. The question is, whether it was in the understanding of the trade “fair merchantable *sassafras wood*,” which it is clearly proved not to have been. It is immaterial that the defendant is a druggist, and skilled in the nature of medicinal woods. He was not bound to exercise

exercise his skill, having an express undertaking from the vendor as to the quality of the commodity.

1813.

T Y E

v.

Plaintiff nonsuited. FYNMORE.

Garrow, A. G. and *Lawes*, for the plaintiff.

Park and *Gurney* for the defendant.

[Attornies, *Edis* and *Fynmore*]

HODGE v. FILLIS and others.

Saturday,
Dec. 11.

THIS was an action by the indorsee against the acceptors of a bill of exchange drawn in the following form :

“ £2.314. 15. 11.

Cork, 12 April 1813.

“ At 2 months date of this our first of exchange
“ (second and third of same tenor and date not paid)
“ pay to our order £2,314. 15. 11. and charge the
“ same to account as advised.

“ W. & A. Maxwell.

“ To Messrs. Fillis & Co. Plymouth, }
“ Payable in London.” }

The bill was accepted by the defendants, “ payable at Sir John Perring’s and Co., Bankers, London.”

Where the drawer of a bill of exchange makes it payable at a particular place, this is part of the contract, and must be mentioned in describing the bill in the declaration. Where a bill of exchange is drawn payable in London, and it is accepted payable at a London banker, in an action against the acceptor, a presentment for payment there is a material averment, and must be proved at the trial.

The first count of the declaration did not state that the bill was made payable at any particular place either by the drawers or acceptors. The second count stated,

H h 4

that

1819.

Hobson

v.
FILLIS
and others.

that it was drawn payable in London, and accepted payable at Perring & Co.'s, and contained an averment, that when due it was presented there for payment.—The plaintiff having proved the partnership of the defendants, their handwriting as acceptors, and the indorsement of W. & A. Maxwell, closed his case.

Giffard, for the defendants, contended, that upon this evidence the plaintiff was not entitled to a verdict. He could not recover on the first count, for that did not properly describe the bill of exchange. The circumstance of the bill being made payable in London was an essential part of the original contract.—The second count described the bill properly; but contained a material averment which had not been proved, viz. that the bill was presented, when due, at the bankers in London, where it was made payable by the acceptors. Without at all considering the effect of an acceptance making the bill payable at a particular place where it was drawn without any mention of a place of payment, there could be no doubt that where a particular place of payment is denoted both by drawers and acceptors, that becomes a term of the contract between the parties, and an averment that the bill was presented for payment there cannot possibly be rejected as irrelevant.

Lord ELLENBOROUGH expressed himself to be of this opinion.

The plaintiff's counsel then proved, that after the bill was due one of the defendants promised to pay it, which

which Lord Ellenborough held dispensed with direct evidence of a presentment for payment at the bankers, and

1813,
Hence
Filled
and others.

. The plaintiff had a verdict.

Garrow, A. G., and *Gaselee* for the plaintiff.

Giffard for the defendants.

[Attornies, *Makenfon* and *Dorke*.]

Vide Callaghan v. Aylett, 3 Taunt. 397. 2 Campb. 549. Fenton v. Goundry, 13 East, 459. Sanderson v. Bowes, 14 East, 500. Huffam v. Ellis, 3 Taunt. 415. Gammon v. Schmoll, 5 Taunt. 344.

SMITH v. LYON.

Wednesday,
Dec. 15.

THIS was an action of assumpsit upon a memorandum for charter between the plaintiff, as master of a ship called the *James and Anne*, and the defendant, a merchant in London, for a voyage from the river Thames to Heligoland or Hamburgh.

In an action by the master of a ship for freight, the declarations of the owner for whose benefit the action is brought, are evidence for the defendant.

The defence rested upon something supposed to have been said by a Mr. *Fagg*, the owner of the ship, amounting to a declaration that she was not sea-worthy, or to a consent to rescind the contract entirely. A witness being called to relate the conversation between the defendant and Mr. *Fagg* when this was alleged to have passed;

Garrow,

1813.

SMITH

v.

LYON.

Garrow, A. G., for the plaintiff, contended, that as *Fagg* was no party to this action, he ought himself to be called as a witness. He would be coming to speak against his interest; therefore there was no objection to his competency; and he could give the best evidence of what he actually said, and of the circumstances which gave rise to the conversation.

LORD ELLENBOROUGH.—Although this action is in the name of the master, it is brought for the benefit of the owner. I am therefore of opinion, that any thing said by the latter is admissible evidence for the defendant.

The declaration, however, did not turn out to be what was expected; and

The plaintiff had a verdict.

Garrow, A. G., *Marryat*, and *Campbell*, for the plaintiff.

Park and *Gurney* for the defendant.

[Attornies, *Williams* and *Burt*.]

Vide *Rex v. Hardwick*, 11 East, 578. *Hart v. Horn*, 2 Campb. 92.

BRUCE and others v. HUNTER.

Wednesday,
Dec. 15.

THIS was an action of assumpsit to recover the balance of an account.

An agent who has advanced money for his principal in effecting insurances and other mercantile business, is entitled to charge interest, and at the end of every year to make a rest and add the interest then due to the principal.

The plaintiffs had effected insurances and advanced the premiums for the defendant, and had transacted other business as agents for him, from the year 1801 down to the present time. They had delivered an account to him annually, and at the close of each year, from the expiration of the first, had charged interest; and at each rest the interest of the preceding year was added to the principal. It was proved that at the several times when the annual accounts were rendered to the defendant, he had never objected to the charge of interest until the year 1811, when he said that he was not bound to pay any interest.

It was now urged, on his behalf, that interest could not be recovered against him, and much less according to the calculation of the plaintiff, which amounted to compound interest,—a claim never allowed at law or in equity. But—

LORD ELLENBOROUGH said, that it was fair and reasonable the defendant should pay interest in the manner charged, and that the accounts, to which he had not objected for a number of years, afforded sufficient evidence of a promise on his part to pay interest in this manner.

1813.

BRUCE
and others
v.
HUNTER.

One of the special jury said, it was the uniform manner of making up accounts of this description.

Verdict for sum claimed.

Garrow, A. G., and Carr for the plaintiffs.

Littledale for the defendants.

[Attornies, *Gregg and Tennant*.]

Vide Calton v. Bragg, 15 East, 223.

Wednesday,
Dec. 5.

PINHORN and others v. TUCKINGTON.

Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest afterwards.

THIS was an action for non-payment of money pursuant to an award, whereby the defendant was ordered to pay to the plaintiffs the sum of £1,950. due on a balance of accounts, on the 21st June 1812, between the hours of eleven and twelve, at Lloyd's Coffee-house.

The question being put, whether interest was recoverable on the award,

Lord ELLENBOROUGH held, that as the money was awarded to be paid on a certain day, interest ought to be allowed from that day, if payment was then demanded at the place appointed.

It was proved, that a person duly authorized by power of attorney, attended at Lloyd's Coffee-house to demand

demand payment between the hours of eleven and twelve on the 21st of January 1812; but that neither the defendant nor any person for him appeared. Whereupon the plaintiff recovered a verdict for the principal and interest from that day.

1812.
Pinnock
and others
v.
TUCKINGTON

Schwyn for the plaintiff.

The cause was undefended.

[Attornies, *Oakly* and *Hindman*.]

See the preceding case of *Bruce v. Hunter*.

WILLIAMS v. SHEER.

Thursday,
Dec. 16.

THIS was an action on a policy of insurance on goods by the ship *Sir Sidney Smith*, "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation."

Where a ship was insured from London to Berbice, with an extensive liberty of touching and trading at all places; held that by putting into Madeira and staying thereafter the convoy with which the failed had proceeded on the voyage, the was guilty of a deviation which discharged the underwriters. *Semble*, that as the captain did not know when the convoy failed away, and ex-

The vessel failed from Portsmouth on the 25th September 1812, with a fleet for the West Indies, under convoy of His Majesty's ship *Narcissus*. They arrived off Madeira on Saturday the 17th of October. The *Sir Sidney Smith* had taken in a quantity of goods for that island, which the captain had been ordered to

pected to overtake it, this was not a deserting of convoy within the meaning of the convoy act.

1813.

WILLIAMS

P.
SHER.

land there, and for which wines were to be sent on board. He began to land the goods as soon as he arrived, but not being allowed to work on the Sunday, he had not got the wines on board till the Monday at noon. The *Narcissus* with the greatest part of the fleet had sailed away the preceding day, and was then too far off to be overtaken. Seven or eight other ships belonging to the fleet, however, were left behind at Madeira; and they all agreed to sail together for mutual protection. With this view the *Sir Sidney Smith* remained at Madeira till the 24th of October. She finally parted company with them off Barbadoes, and on the 19th of November was captured by an American privateer on her way to Berbice. The owner of the goods insured was on board during the voyage.

Garrow, A. G., contended, that the underwriters were discharged on two grounds; 1st, The ship by putting into Madeira, and staying behind there when the rest of the fleet had sailed, had been guilty of a deviation; 2dly, The captain had wilfully deserted the convoy, and as this was done with the privity of the owner of the goods, who was on board, the policy was vacated.

Park, for the plaintiff, insisted, 1st, That the ship had a right to put into Madeira, and to stop there in the manner she had done, under the liberty given by the policy to touch and stay at all ports and places to land, load, and exchange goods. 2dly, The captain could not be said wilfully to have deserted the convoy; for he was anxious, if possible, to enjoy its protection; and the convoy had rather deserted him.

Lord ELLENBOROUGH.—I am of opinion that the underwriters are discharged on the ground of deviation. The liberty in the policy must be construed with reference to the main scope of the voyage insured. I am inclined to think, this was not a wilful desertion of convoy within the meaning of the act, as the captain appears to have acted *bonâ fide*, and not to have been aware of the precise time when the convoy failed away from Madeira. However, it is unnecessary to determine that point now; for upon well-established principles the ship was guilty of a deviation by putting into Madeira and voluntarily staying behind there for the purposes of trade, when the rest of the fleet had failed away in the prosecution of the voyage.

WILLIAMS
v.
SHEP.

Plaintiff nonsuited.

Park and *Barnewall* for the plaintiff.

Garrow, A. G., and *Nolan*, for the defendant.

[Attornies *Nettlehip* and *Pafmore*.]

Vide *Redman v. London*, post.

Thursday,
Dec. 16.

CORLETT. v. GORDON and another.

Merchants in London receive from a mere stranger residing abroad a bill of lading of certain goods in a letter requesting them to effect insurance. They declining to do business for the consignee, but acting bona fide with a view to his interest, indorse the bill of lading to a friend of his, who receives the goods, and afterwards fails with the proceeds in his hands.—*Held*, that the merchants by indorsing the bill of lading were liable to the consignee for the amount.

ACTION on the case. The first count of the declaration stated, that the plaintiff had caused to be delivered to the defendants 43 bales of cotton, to be by them sold and disposed of on account of the plaintiff, and in case they could not be sold and disposed of, to be returned by the defendants to the plaintiff on request; but that the defendants wrongfully and unjustly converted the same to their own use. The second count alleged, that the goods were delivered to the defendants for safe custody; and the last was in trover. Plea, Not guilty.

The plaintiff being at Parimaribo in South America in the year 1808, inclosed a bill of lading of the cotton in question in a letter addressed to the defendants, who are merchants in London, requesting them to effect insurance to the full amount. The defendants had not done business for the plaintiff before, and had not come under any promise to act as his consignees. For some reasons they wished to decline doing so; and on receiving the bill of lading they indorsed it over to one *Major*, a friend and creditor of the plaintiff. *Major* effected the insurance and received the goods, which never came to the possession of the defendants. He afterwards became insolvent with the proceeds in his hands.

Topping for the defendants contended, they were not liable in this action, as the consignment had been thrust

thrust upon them, and they had acted *bonâ fide* for the plaintiff's interest. They were not bound to insure and to sell the goods. If they did not, was not the indorsement of the bill of lading to *Major* the best thing that could be done? If this step had not been taken, the goods might have been lost on the voyage, without any claim of indemnity from the underwriters; and if they had arrived, they would have been seized as forfeited, to pay the duties.

1813.
CORLETT
v.
GORDON
and another.

LORD ELLENBOROUGH.—The defendants had no right to indorse the bill of lading. They could not devolve upon another the authority conferred upon them, and turn over the property to a stranger. It is difficult to say what they ought to have done; but I am quite clear that they were not justified in doing what they did. They had their election either to take or reject the bill of lading. If they took it, they were bound to take it according to the terms of the consignment, by which they themselves were to insure and sell the goods. They appear to have acted with good conscience; but they were not correct in point of law.

The plaintiff had a verdict for the value of the goods.

Garrow, A. G., Park, and Marryat, for the plaintiff.

Topping and Scarlett for the defendants.

[Attornies, *Reardon and Blunt*]

Friday,
December 17.

BAKER v. DAVIS.

In an action for use and occupation, where the tenant has paid the property tax before action brought, he has a right to deduct it at the trial.

THIS was an action for use and occupation to recover £30. for three quarters of a year's rent.

The defendant paid into Court the whole of the rent except a sum equal to the landlord's property tax for the premises in question, which he had paid to the tax-gatherer before the action was commenced.

Burrough for the plaintiff contended, on the authority of *Pocock v. Eustace*, 2 Campb. 181, that the property tax could not be deducted from the rent, in settling the amount of the damages in an action for use and occupation.

LORD ELLENBOROUGH. There the property tax had not been paid by the tenant at the time of the trial; and it is only after payment that the deduction can be claimed. Here, however, the defendant has an undoubted right to the deduction; for he had paid the tax before action brought.

Plaintiff nonsuited.

Burrough and *Lawes* for the plaintiff.

Park for the defendant.

[Attornies, *Reynolds* and *Allingham*]

REUSSE

REUSSE v. MEYERS.

Friday,
December 17.

THIS was an action of assumpsit by the master against the freighter of a ship, for not loading and dispatching her on a voyage from London to Gottenburgh. The ship was denominated in the memorandum for charter "The Swedish ship or vessel called the Maria."

The defence was, that the ship, instead of being *Swedish*, was *British* built, whereby the defendant had been prevented from sending her to Gottenburgh, a Swedish port.

To prove this, the defendant first offered in evidence a British register of this ship, stating J. Evans of Yarmouth to be sole owner. But—

Lord ELLENBOROUGH held, that this was no evidence she was British-built, without first proving that Evans was privy to the register, and then through some other medium that he was owner of the ship. In the manner in which the register was actually presented, it was merely *res inter alios acta*, and proved nothing.

Evans himself, being in court, was then called, and stated that he was sole owner, and had obtained the register for her as a British-built ship, according to her real character; but that at the time this contract was

To prove that a ship is British-built, a British register so describing her is by itself no evidence.

A ship was described in a memorandum for charter as "the Swedish ship or vessel called the Maria." In fact she was British-built, and had a British register, but she had a complete set of Swedish papers and a treasury licence to sail as a Swedish ship, which particulars were known to the freighter:—*Held*, that in an action against him for not loading and dispatching the ship according to the memorandum for charter, he could not set up as a defence that she was in point of fact a British and not a Swedish ship.

1813.

REUSSE

v.

MEYERS.

entered into, she had a complete set of Swedish papers, and a treasury licence to sail as a Swedish ship, all which particulars were known to the defendant.

LORD ELLENBOROUGH.—I should hold, that the ship must correspond with the description in the written contract ; but she is Swedish in one sense, being furnished with Swedish papers, and in a condition to navigate as a Swedish ship. Although the expression in the memorandum for charter be ambiguous, I think it was enough that she had a Swedish national character imposed upon her, and that she was Swedish within the meaning of the parties to the contract.

The plaintiff had a verdict.

Garrow, A. G., and *Abbot*, for the plaintiff.

Park and *Scarlett* for the defendant.

[Attornies, *Bovill* and *Keursey*.]

See case of *BENNETT*, *Partridge*, 1 Dobl. Adm. R. 175. and case of *GUTE HOFFNUNG*, *Steffins*, ib. 251.

MERCER *v.* JONES.Monday,
December 20.**T**ROVER for bills of exchange.

The question was, how the damages were to be calculated, the plaintiff contending that he was entitled to interest to the time of final judgment, and the defendant that in this form of action the principal only was recoverable.

In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion.

LORD ELLENBOROUGH. In trover, the rule is, that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion. There is no reason why this rule should not be applied to trover for bills of exchange. The damages, therefore, in this case, must be calculated by the amount of the principal and interest due upon the bills of exchange at the time of the demand and refusal to deliver them up.

Verdict accordingly.

Garrow, A. G., and Marryat for the plaintiff.*Jervis and Abbott* for the defendant.[Attornies, *Tilson and Prigland.*]

Monday,
December 20.

DUNCAN v. LOWNDES AND BATEMAN.

In an action on a guarantie for the debt of a third person, signed by one of two partners in the partnership firm, it is necessary to give some evidence beyond the relationship of partners subsisting between them, that the one who signed had authority to bind the other by the guarantie.

But for this purpose it would be sufficient to prove a parcel acknowledgement from the other partner subsequently to the giving of the guarantie, or to shew a previous course of dealing, in which similar guaranties had been given in the partnership firm, with the privity of both partners.

THIS was an action on a guarantie alleged to have been given by the defendants for the due payment of a bill of exchange to the plaintiff for £670. 15s. accepted by *Dickinson & Co.*, for the price of goods which the plaintiff had sold them.

It appeared that the two defendants carried on business together as merchants at Liverpool, and that this guarantie was signed by *Lowndes* in the partnership firm.

Garrow, A. G., for the defendants, insisted, that the plaintiff was bound to give some direct evidence that *Bateson* had authorized *Lowndes* to enter into this undertaking.

Scarlett, contra, contended, that this was to be inferred from the relation subsisting between them.

LORD ELLENBOROUGH. As it is not usual for merchants, in the common course of business, to give collateral engagements of this sort, I think you must prove that *Lowndes* had authority from *Bateson* to sign the partnership firm to the guarantie in question. It is not incidental to the general power of a partner to bind his co-partners by such an instrument.

Scarlett then proposed to shew that *Bateson* had subsequently approved of the guarantie, which he contended

contended would be evidence of a prior authority to give it.

1813.
DUNCAN
v.
LOWNDES
and
BATEMAN.

Garrow, A. G., objected, that this being an undertaking for the debt of another, *Bateson* could only be rendered liable by a note in writing.

LORD ELLENBOROUGH. All that the plaintiff has to prove is *Lowndes's* authority to sign the partnership firm to the guarantie. When that is established, there is a very good note in writing to bind both partners. For this purpose, I think a subsequent recognition by *Bateson* may be given in evidence, as well as a prior command; and either the one or the other may be shewn by parol as well as by a written document. Proof of a previous course of dealing in which such guaranties were given, and to which both partners were privy, I think, would be sufficient. ‡

The plaintiff, however, was not prepared with any evidence to affect *Bateson*, and submitted to be nonsuited.

Scarlett and *Littledale* for the plaintiff.

Garrow, A. G., and *Park*, for the defendants.

[Attornies, *Atkinson* and *Cooper*.]

Vide Lord Galloway v. Matthew, 10 East, 264.

Thursday,
December 23.

DOBSON and Others *v.* WILSON.

An action at law may be maintained to recover a contribution in the nature of general average by one shipper of goods against another.

Where the master of a ship in a foreign port was arrested by process out of a court of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on her account, and the master not being able to raise money by other means, that he might procure his liberation and pursue the voyage, sold a part of the cargo; *Held*, that the owner of the goods so sold, had no right to a contribution in the nature of general average from the shippers of the other goods on board which arrived safely at the port of destination.

THIS was an action for general average by one shipper of goods against another. The declaration contained one special count stating the facts of the case, a count in indubitatus assumpsit for general average, and the usual money counts. Plea, the general issue.

The plaintiffs, in the month of May 1807, shipped on board the *Rochdale*, Captain Garton, four bales of woollen-drapery goods, of the value of £1124, to be carried on a voyage from Hull to St. Petersburg. The defendant at the same time shipped on board the same vessel 322 packages of cotton goods, valued at £16,100, on the same destination. Some other goods, belonging to different persons, were likewise shipped in the *Rochdale* for this voyage; but they were comparatively of trifling value.

The ship sailed from Hull in the beginning of June; and having met with very tempestuous weather, was obliged to put into Stromstadt, a port in Sweden, to repair. She again sailed in prosecution of her voyage on the 10th of July. On the 13th of the same month she got aground on the Scaw. Assistance was procured, and at a heavy expence she was got off. However, she was so much injured that she was forced to bear away for Copenhagen, where she arrived on the 19th. There the cargo was unloaded; and the ship was new sheathed, and underwent other repairs. For the expence incurred in getting her off the Scaw, the captain gave a bill upon Mr. Parker, merchant

a merchant at Elfsineur, who was the ship's agent. This bill Mr. Parker accepted and paid. He also, in the same capacity, paid the dues for the ship passing the Sound, and the expence of the repairs done to her at Copenhagen. On the 16th of August she was ready to proceed on her voyage; but the English expedition against Copenhagen then coming in sight, she was seized by the Danish government, and the captain and crew were made prisoners of war. They remained in confinement till the 9th of September, when they were set at liberty, and had the ship delivered up to them, in consequence of the surrender of Copenhagen to the British forces. In consequence of the hostilities with Denmark, it became impossible to negotiate bills upon England for the purpose of repaying to Parker the sums he had disbursed for the ship's use; and the captain was quite unable to satisfy his demand. Parker thereupon caused the captain to be arrested by process out of the Naval Court of Justice at Copenhagen; and that Court decreed that he should pay the debt due to Parker before he could be released. In this situation, the captain, for his liberation from imprisonment, and that he might be able to prosecute his voyage, found it would be necessary to sell a part of his cargo; and the four bales of woollen goods belonging to the plaintiffs, being nearest at hand, were selected and sold for that purpose. On the 20th of October he was again ready to pursue his voyage; but a war with Russia being apprehended, he was ordered by Admiral Gambier to return home. The ship arrived safe at Hull, where the defendant's goods were restored to him.

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Topping for the plaintiffs. 1st, There can be no doubt that one shipper of goods may maintain an action against another for a contribution in the nature of general average. He whose goods are sacrificed for the safety of the ship and the rest of the cargo, has by law a right to recover a compensation from those whose property is saved. Where the law gives a right, it gives a remedy. It is objected, that the contribution to the general average among the shippers of goods can only be settled in a court of equity. But wherever, as in this case, the law upon a valuable consideration implies a promise to pay a sum of money, an action at law may be supported to recover it. A concurrent remedy is sometimes offered by a suit in equity; but the courts of law are never ousted of their jurisdiction. The difficulty of ascertaining the exact amount of the contribution, can be no argument against the action; for the amount may be proved before a jury as well as before a Master in Chancery. Neither is the multiplicity of actions, which may thus be brought, any valid objection to a particular individual recovering by action a sum of money which is allowed to be due to him. Multiplicity of actions is used as a reason in particular cases for refusing all remedy—as for a public nuisance which has occasioned no private damage—but never for driving into a court of equity a party to whom a sum capable of being liquidated is acknowledged to be due. These arguments would apply with equal strength against an action for general average by the owner of the ship. But it has been solemnly determined, both by the Court of K. B. and the Court of C. P., that such an action may be maintained. *Birkley v. Presgrave*, 1 East, 220. *Price v. Noble*, 4 Taunt.

4 Taunt. 123. In the last case, it is remarkable the contribution was claimed for stores thrown overboard, and not for any damage done to the hull or apparel of the ship. But is not the ship-owner, with regard to the stores, in the same situation as the owner of goods put on board to be carried on freight?—2dly, There can be as little doubt that this is a case of general average. The plaintiffs' goods were necessarily sold for the purpose of preserving the ship and the rest of the cargo; and the defendant's goods have thereby been preserved and restored to him. The captain was imprisoned. The ship could not depart without him. The sale of the goods was the only mode of procuring his liberty. Was not the emergency the same as if the ship herself had been seized, and a part of the cargo had been sold to redeem her? She was as effectually prevented from sailing, by the arrest of her captain, as if her rudder had been carried away, and detained by the officers of the court of justice at Copenhagen, till *Parker* was satisfied. The question is, whether the plaintiffs' property was *bonâ fide* sacrificed for the prosecution of the adventure. It must be allowed, that the ship could not otherwise have sailed; and the probability is, that the defendant's goods would never have been restored to him. Having derived so much benefit, ought he not to bear a part of the burthen? Even if any doubt could be entertained with respect to so much of the money as went to pay the bill of exchange and the repairs at Copenhagen, the Sound dues come within every definition of general average, as for these the ship and cargo were liable to confiscation.

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Garrow, A. G., contra. 1. There is a great difference between an action for general average by the ship-owner and by one shipper of goods against another. The ship-owner is accountable in the first instance to the owner of the goods thrown over board, or necessarily sold. It is therefore his duty to settle the whole of the average among all the parties concerned. Having paid for the goods which are sacrificed, after deducting their proportion of the charge, all the other shippers become debtors to him alone. He alone, therefore, has to bring actions for a contribution; and in such actions at his suit, the amount of the damages to be recovered may be ascertained by a very simple calculation. But where there are a great variety of shippers, if they were allowed to bring actions and cross actions against each other, the most inextricable confusion would ensue. Cases might easily be put to illustrate the utter impossibility of proving before a jury the amount of the contribution to be paid by one shipper of goods to another. Where the average is not settled between the ship-owner and each particular shipper, the respective claims and liabilities of the shippers among themselves can only be unravelled and adjusted in a court of equity. It is a strong argument to shew this action cannot be maintained, that this is the first instance of such an action being brought. In both the cases cited, the plaintiff was the owner of the ship. In the last, the contribution was claimed for the ship's stores that had been thrown overboard; but there is no distinction between a jettison of stores, and of anchors or guns belonging to the ship; and that case proves no more than the former. 2. At all events, this defendant is not liable to any contribution
either

either at law or in equity. The plaintiffs' goods were sold to liberate the person of the master from imprisonment for a debt which ought to fall exclusively upon the ship-owner. Suppose the master had committed some offence at Copenhagen, and had been thrown into prison for not paying the fine imposed upon him; would the sale of a part of the cargo to redeem him from imprisonment have constituted a general average? It does not appear that the ship might not have sailed without the master, or that another might not have been procured. The plaintiffs are certainly entitled to the value of their goods; but they must seek their remedy against the owner of the ship, and not a co-shipper, who is as little answerable as if the master had wantonly destroyed them.

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LORD ELLENBOROUGH.—Upon the general question, I am inclined to think that such an action as this may be maintained. A court of equity may, perhaps, be a more convenient forum for adjusting the claims of the different parties concerned; but if a shipper of goods which are sacrificed for the salvation of the rest of the cargo is entitled to receive a contribution from another shipper, whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy. The difficulty of shewing by strict evidence the exact amount of the contribution is great; but as there are data upon which it may be calculated with great certainty, I think this is no objection to the action. The plaintiff by proceeding at law takes that difficulty upon himself, and if he is not prepared to overcome it, he cannot

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cannot succeed. Nor does the multiplicity of actions which may thus be brought appear a ground on which I can hold that relief must be sought in equity. If there is no valid objection upon principle to a particular action, I know not how I can turn round the plaintiff by saying, that an inconvenient number of similar actions may be commenced. I cannot perceive why the shipper of goods may not maintain an action at law for general average as well as the owner of the ship. 2. I must see, however, that this is a case in which general average can be claimed; and I am of opinion that it is not. Is there here any thing like a *jactus mercium levandæ navis gratiâ*? A jettison to lighten the ship is not the only foundation of general average; but it must arise from that or something analogous. The distinction between general and particular average would otherwise be entirely abolished, and the shippers of goods would be called upon to contribute to losses from which they derive no benefit, and which ought to fall exclusively on the ship-owner. Here the agent of the ship arrests the person of the master, both being agents of the owner, who had undertaken to carry the whole cargo safely to its destined port. This is different from the arrest of the captain by a foreign force. Even there I am not aware it has ever been held that the master is so inseparably united to the ship, that to redeem him it is lawful to sell a part of the cargo. The process of the court of justice at Copenhagen was not directed against the ship, and was confined entirely to the person of the master; it was merely an arrest for a personal debt. I was at first struck by what was said about the Sound dues; and had the ship been seized

for non-payment of these, I should have thought the sale of a part of the cargo to pay them, in the absence of all other means to raise money for that purpose, might have been the foundation of a claim for general average. But these dues had been paid to the Danish government by *Parker*, the ship's agent, and the money so paid merely constituted a private debt due to him, which he sought to recover by process against the person of the master. It comes to this—whether if the captain be severed from the ship, whatever be the cause, he may sell a part of the cargo to redeem himself? I see no distinction between this arrest for debt and an arrest for an assault he might have committed in the streets of Copenhagen. No case has been cited, or principle advanced, to shew that a claim for general average can arise from an act done to redeem the master of a ship from such an imprisonment. I therefore do not think that any part of the plaintiffs' goods was sacrificed for the safety of the ship and the residue of the cargo, in such a manner as to give them a right to a contribution from the other shippers of goods on board. Their proper remedy is against the owner of the ship.

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Plaintiffs nonsuited.

Topping and *Littledale* for the plaintiff. .

Garrow, A. G. and *Park*.

[Attornies, *Hollyard* and *Hall*.]

Vide Abbott on Shipping, Part III. c. 8.

MASTERMAN

Thursday,
December 23.

MASTERMAN and Others v. COWRIE.

An agreement that London bankers should accept and pay bills of exchange drawn in the country for a commission of 5s. per cent. being furnished with funds to pay the bills before they became due, cannot be usurious, there being no contemplation of an advance of money.

If upon such an agreement an advance of money were contemplated, it would be a question of fact, whether the commission was a shift to obtain more than legal interest for the forbearance, or a compensation for the trouble and expense incurred in accepting and paying the bills of exchange.

THIS was an issue directed by the Lord Chancellor, to try whether at the time of the suing forth of a commission of bankrupt, bearing date the 2d of November 1812, against *John Hughes Goodlake* and *William Hartley Goodlake*, they were indebted in any and what sum of money to the plaintiffs.

The plaintiffs are bankers in London. In October 1811, *David Bromer*, a merchant in London, who did not keep cash with them, applied to them to accept bills for him at short dates, for which he was to provide before they became due. Accordingly, it was agreed that such bills should be drawn by some person procured by him; that the plaintiffs should accept them; that *Bromer* should always provide for them before they became due; that by way of security he should deposit with the plaintiffs good bills, at long dates, to a larger amount; and that the plaintiffs should receive a commission of five shillings per cent. upon the bills accepted and paid by them for their trouble. After the parties had dealt together some time on the footing of this agreement, the plaintiffs expressed themselves dissatisfied with the manner in which the bills were drawn, and requested that they should be drawn for the future by some respectable person in the country. *Bromer* said, if the plaintiffs could procure any such person, he would allow him one shilling per cent. for his trouble in drawing the bills. *William Maude*, a banker at Otley in Yorkshire,

Yorkshire, was then mentioned, and he consenting to the arrangement, it was agreed, that in future the bills should be drawn in his name. In this way the plaintiffs continued to accept and pay bills, at two months, drawn upon them by *William Maude*, till *Bromer* became bankrupt in September 1812, charging the 5s. per cent. commission for themselves, and the 1s. for the drawer, which was regularly paid him. During the whole of that time they never were in advance to *Bromer*. Afterwards, they were obliged to take up bills they had accepted for him, for which he had not provided funds. He had lodged with them, by way of security, bills to the amount of £19,296. 1s. 9d. accepted by *J. H. Goodlake* and *W. H. Goodlake*. These persons soon afterwards themselves became bankrupt, and the present question arose upon the plaintiffs seeking to prove the bills under their commission. One of the plaintiffs having been examined before the commissioners, and having declared that interest never had been charged to *Bromer*, was asked, whether, if *Bromer* had not become bankrupt, interest would not have been charged by them upon any cash they advanced to take up their acceptances?—to which he answered, there was no agreement for that purpose; but he supposed they would have charged legal interest.

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Garrow, A. G., for the plaintiffs, stated the question to be, whether the transactions between them and *Bromer* were tainted with usury? and contended there could be no usury in the case, as there was no advance of money. The 5s. per cent. could not be referred to forbearance, there being no debt to be forborne,

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and was merely a compensation for their trouble in accepting and paying the bills. The compensation was extremely moderate ; but were it ever so extravagant, it could no more be made usury than any other payment for work and labour done and performed.

Park, contra, insisted, that this was substantially an agreement for the loan of money, and that if the agreement was usurious, no valid debt could arise out of it. The plaintiffs could not have maintained an action against *Bromer* for the money they paid in taking up their acceptances, and therefore could have no claim against *Goodlake and Co.* upon the bills lodged in their hands as a security for an usurious debt. He relied upon *Kent v. Lowen*, 1 Campb. 177. in which it was held, that a person accommodating another by accepting a bill of exchange, cannot, like a country banker discounting a bill, take any thing beyond five per cent. interest, by way of commission, without committing usury.

LORD ELLENBOROUGH.—The issue sent by the Chancellor is to try whether the debt of *Goodlakes* to the plaintiffs is constituted in usury. If it be so, it is no debt at all. The usury is supposed to be committed in the dealings with *Bromer*. The agreement between them was this: they, in consideration of a quarter per cent. were to accept and pay for him bills drawn by *William Maude* at Otley in Yorkshire ; before they became due, he was to provide funds to take them up ; he was likewise to lodge other bills at longer dates in their hands by way of security ; and he was to allow a shilling per cent. to the drawer of the

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the bills. Here no advance of money is anticipated. It might have happened, by the cash not being provided, or the securities proving unproductive, that an advance might possibly have taken place; but it does not appear to have been in the contemplation of the parties. The first question is, whether there was a contract for a loan? If there was, there may be usury to vitiate the debt, or to cut down the securities, although no advance took place till after *Bromer's* bankruptcy upon which no interest was charged. There must be an actual loan and a receipt of usurious interest to render a party liable to penalties; but if there be a stipulation for more than five per cent. upon a contemplated advance, the agreement is usurious, and no transactions under it can be the foundation of a valid debt. Here, however, nothing appears to have been anticipated to be done by the plaintiffs beyond the acceptance and payment of the bills. They never were in advance to *Bromer* till after his bankruptcy, and there seems no reason to suppose that a loan of money was ever in their thoughts. If so, the commission of 5s. per cent. could not be for forbearance, and could not be the foundation of usury. The only question arising out of the 1s. allowed to the drawer is, whether that was a colour for usury. If it was *bonâ fide* applied to *Maude's* use, it cannot be usurious, and it may be entirely removed from the consideration of the case. Then may not the 5s. be accounted for on the score of the trouble which the plaintiffs had in accepting and paying the bills, in receiving the funds for that purpose, and in taking care of the securities deposited with them? It has been decided that *country bankers* may charge a commission beyond the £5. per

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cent. for the money advanced. Instead of the expression, country bankers, I prefer a description of the thing done. Before all mercantile transactions were carried on by means of a paper circulation, country bankers were at a great charge in procuring cash. It was a sort of foreign commodity which they had to import; therefore, in conveying and insuring it, they incurred a great collateral expence. If under these circumstances they were allowed only 5 per cent. on the whole transaction, they might have received only $4\frac{1}{2}$ for the forbearance of the money advanced. A similar expence may be incurred every where, by keeping clerks and a counting-house on purpose to accept and pay bills with funds provided by the person for whom the business is done. In all these cases it is necessary to detach the trouble of keeping accounts, from interest for the forbearance of money. I remember an issue being tried at Chester, whether 5s. per cent. was a fair commission upon the discount of bills there; and it was found to be so. I agree with what the Chancellor is stated to have said in directing the present issue, that unless there be an eventual advance of money contemplated, there can be no usury. Here the advance of money was not the substance of the contract. It was never mentioned among the parties, and never happened till the close of the transactions, when no interest was charged upon it. Had an advance been made, I should have left it to the jury whether the commission was a shift for obtaining more than legal interest for the forbearance of the money. But if an advance was neither made nor contemplated, the commission can be considered only a compensation for services performed.

Verdict,

Verdict, that *J. H. Goodlake* and *W. H. Goodlake* were indebted to the plaintiffs in the sum claimed.

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Garrow A. G., Topping, Marryatt, and Irvine, for the plaintiffs.

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Park and Puller for the defendant.

[Attornies, *Sudlow and Devon.*]

Vide Barclay q. t. v. Walmsley, 4 Ealt. 55.

DENTON and Others v. RODIE and Another.

Thursday,
Dec. 23.

THIS was an issue to try whether *James Henry Clough*, *Joshua Smithson Wilkes* and *James Butler Clough* were, at the date and suing forth of a commission of bankrupt against them, indebted to the plaintiffs in any and what sum of money.

Where one of several partners, with the privity of the others, draws bills of exchange in his own name upon the partnership firm, in favour of persons who advance him the amount, which he applies to the use of the partnership, altho' the partners are not jointly liable on the bills, they may be jointly sued by the payees for money lent.

The bankrupts entered into partnership together as general merchants at Liverpool, in 1806, under the firm of *Clough, Wilkes, and Clough*. Soon after, in pursuance of a previous arrangement, *James Butler Clough* went out and established himself at New York, in the United States of America, with a view to form connexions, and to procure consignments for the benefit of the house at Liverpool. While there he did no business on his private account. For the purpose of

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raising money, he was in the habit of drawing bills in his own name upon the house, in the following form :

New York,
 17th Aug. 1810.

No. 218. Exch. £1,500 Sterl.

Sixty days after sight of this second of exchange (first, third and fourth unpaid) pay to Messrs. Denton, Little, and Co. or order £1,500. sterling in London, value received, and place the same to account of sundries, as advised by,

J. B. Clough.

To Messrs. Clough, Wilks and Clough,
 Liverpool.

These bills he sold at New York for cash or promissory notes at short dates, according to the current rate of exchange. The money thus raised, he applied entirely in the purchase of homeward investments for the house at Liverpool, or in defraying his personal expenses, for which, it was understood, he was to have had £400. a year, but for which no regular allowance was made him. He had often no other funds for these purposes. He periodically remitted home an account of the manner in which he thus raised and applied the money, which was never complained of. The house at Liverpool regularly accepted and paid the bills so drawn, till it stopped payment in November 1810. *J. B. Clough* afterwards returned to England, and a joint commission of bankrupt was sued out against the three partners on 5th December 1811.

The plaintiffs are British subjects, who carried on trade at New York, under the firm of *Denton, Little, and Co.* They became holders of the bill of exchange above set out,

out, and, subsequently, of several others of the same import, by advancing money upon them to *J. B. Clough*, according to the rate of exchange. The first was accepted by the house, but not paid, and the house had stopped payment before the others were presented for acceptance. These bills the plaintiffs wished to prove upon the joint estate of the three bankrupts. The joint creditors insisted that they could only be proved upon the separate estate of the drawer. To determine that question, the present issue was directed by the Lord Chancellor.

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Garrow, A. G., for the Plaintiffs, contended that the bills were to be considered as drawn by the house, although in the name of one partner; and that at any rate the partners were all jointly indebted, as the money advanced upon the bills had been raised for their joint use, and applied for their joint benefit.

Topping, contra, relied upon *Emly v. Lye*, 15 East. 7. as an authority expressly in point. There one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker; and it was held that the latter had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; the money being advanced solely on the security of the parties whose names were on the bills *by way of discount*, and not by way of *loan* to the partnership;

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though the banker conceived, at the time, that all the bills were drawn upon the partnership account.

LORD ELLENBOROUGH.—I think this case is distinguishable from *Emly v. Lye*. Here I conceive the partner in America had authority from the two others to raise money for the use of the firm; and money was accordingly raised from the plaintiffs upon these bills, in pursuance of such authority. The transaction is a loan rather than a discount. *J. B. Clough* was sent out to America to manage the business of the house there, and to procure homeward investments. The shipments from this country did not form an adequate fund for that purpose. He says himself that he had a *carte blanche* as to the means he should adopt. He accordingly raises money, for which he gives as a security bills of exchange, drawn in his own name, upon the house. They know and recognize this mode of dealing. They regularly accept and pay the bills so drawn till the time of their failure. Therefore, although I cannot say they are jointly liable upon the unaccepted bills, I think they are jointly indebted to the same amount, as for money lent, or money had and received.

It was then suggested that the plaintiffs, upon this supposition, could not claim interest; but Lord Ellenborough thought, that from the course of dealing, the plaintiffs were entitled to interest, although they did not recover upon the written securities.

Verdict accordingly,

Garrew,

Garrow, A. G., Park, and Littledale, for the plaintiffs.

Topping, Scarlett, and Richardson, for the defendants.

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[Attornies, *Cooper* and *Lowes*.]

Vide Siffkin v. Walker, 2 Campb. 308.

CARSTAIRS and Others, Executors of LYON,
v. ALLNUTT.

Thursday,
Dec. 23.

THIS was an action on a policy of insurance on the ship *Simon Clarke*, at and from her port or ports of loading in Jamaica to Leith.

To vacate a policy of insurance for an infraction of the convoy act, it is not enough to shew that the ship sailed without convoy by the instrumentality of an agent of the assured, unless it appear that the agent had authority from his principal for this purpose.

The defence was, that the ship had been guilty of a breach of the convoy act, by the instrumentality of the agent of *Sibbald*, the owner, in whom the interest was averred.

Sibbald resides at Leith. In February 1812, the policy was effected in London by *Lyon* his agent, who stated to the underwriters, " he was uncertain whether the ship would sail home with convoy or not; he thought she very likely would sail with the May convoy; if not, she would run it in company with another ship of *Sibbald*'s, called the *Lady Forbes*; that he therefore wished, instead of the common premium of

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of eight guineas, to return four for convoy, a medium premium of six guineas should be fixed without any returns." The policy was accordingly effected upon these terms.

The ship sailed from Jamaica on the 1st of August, without convoy, and was captured on her voyage home. *Sibbald's* son was on board; but it did not appear in what capacity.

Garrow, A. G., for the defendant, contended that these facts afforded sufficient evidence of the assured having "directed or been in some way privy to or instrumental in causing the ship to sail without convoy."

LORD ELLENBOROUGH. I think there is no evidence here to connect the owner with the breach of the convoy act. That is a very penal statute, and is to be construed strictly. It is not enough that an agent of the assured is privy to or instrumental in causing the ship to sail without convoy. To vitiate the policy there must be the personal privy of the assured, and the *instrumentality* must be by his own act. Where the conduct of the agent of the assured is set up as an infraction of the convoy act, it must be shewn that he had authority from his principal for that very purpose. Therefore *Sibbald* in this case cannot be affected by the act of the captain in sailing without convoy; nor would it be material if (which does not appear) his son had been supercargo, and had directed this to be done. Then it comes to the representation of the broker to the underwriters. He seems rather to have expected that the ship would sail with convoy; and

and at any rate what he said does not prove that his principal had given directions to the contrary.

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Verdict for the plaintiff.

Park and *Scarlett* for the plaintiffs.

Garrow and *Richardson* for the defendant.

[Attornies, *Shepherd* and *Dann*.]

Vide *Cohen v. Hinckley*, 1 Taunt. 249. 2 Campb. 51. *Wainhouse v. Cowie*, 4 Taunt. 178.

HENRY v. LEIGH.

Thursday,
Dec. 24.

THIS was an action against the defendant as drawer of a bill of exchange for £2000. dated the 20th of October 1810, payable 15 months after date to the defendant's order, and by him indorsed to the plaintiff.

To prove the allowance of a bankrupt's certificate by the Lord Chancellor, the book kept in the office of the secretary of bankrupts, in which entries are made of the allowance of certificates, is not secondary evidence.

Pleas, 1st. The general issue; 2dly, bankruptcy. Replication to the last plea, that the defendant had been before discharged by virtue of 5 Geo. 2. c. 30. and that he had not paid 15s. in the pound under the second commission awarded against him (a). Rejoinder, that

To prove that the defendant who pleads his bankruptcy had been before discharged as a bankrupt,—after notice to produce the former certificate, it is enough if witnesses state they were employed by him to solicit that certificate, and that looking at the entries in their books they have no doubt it was allowed by the Lord Chancellor.

been before discharged as a bankrupt,—after notice to produce the former certificate, it is enough if witnesses state they were employed by him to solicit that certificate, and that looking at the entries in their books they have no doubt it was allowed by the Lord Chancellor.

(a) In *Wilson v. Kemp*, E. T. 1814, the court of K. B. decided that such a replication to a plea of bankruptcy is bad on special demurrer.

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the defendant had not been before discharged ; and issue thereupon.

The formal evidence on the bill being given, the plaintiff proved a notice upon the defendant to produce his certificate under the first commission, which was not produced. The defendant's affidavit of conformity under that commission procured from the office of the Secretary of Bankrupts was then put in. To prove that the certificate had been allowed by the Lord Chancellor, Mr. Church, a clerk from the same office, was then called. He produced a book kept in the office, containing an account of the allowance of bankrupts' certificates. In this there was an entry in the hand-writing of one *Charnock*, another clerk in the office, not called as a witness, which stated that the defendant's certificate was allowed by the Lord Chancellor on the 2d of October 1803. The mode in which these entries are made was described to be as follows: When several affidavits of conformity have been filed in the office of the Secretary of Bankrupts, a clerk from the office carries them together with the certificates to the Lord Chancellor, who signs the certificates in the presence of the clerk. The latter then writes "*all.*" for "*allowed*" on the back of the affidavits. As soon as he has returned to the office, he makes entries of these allowances in the book kept for that purpose. This book is the only register kept of certificates being allowed. It is consulted by the public who wish for information respecting the allowance of bankrupts' certificates ; but it is never seen or referred to by the Lord Chancellor. Neither the Secretary of Bankrupts nor his clerks are sworn officers.

Garrow,

Garrow, A. G., for the plaintiff, contended, that this was good secondary evidence of the allowance of the certificate. The book must be considered an official document. The most serious consequences must follow to bankrupts themselves if it were rejected; for in case of their certificates being lost, this is the only evidence to protect them from their creditors. The entries were made in the course of office, and were to be admitted like the rules of the courts of common law, without calling the clerk who wrote them.

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HENRY
v.
LEIGH.

Topping, contra, maintained, that in the absence of *Charnock* this entry was not evidence. While he was alive it was not the best secondary evidence that could be adduced; for if the certificate ever was allowed, according to the course of proceeding described, it must have been allowed in his presence. Why then was he not called to state the fact? The entry might be a forgery, and from some motive or other might be written by him although the certificate never existed.

LORD ELLENBOROUGH.—Had this book been kept by order of the Lord Chancellor; had it from time to time been laid before him; had he referred to it and acted upon it, I should have held it admissible evidence to prove the allowance of the certificate, without calling the clerk by whom the entry was made. But from the account now given of the book by the witness, I am inclined to think it is not receivable. I can hardly attach to it the authenticity of an official document. It appears rather to be the private memorandum of the clerks, kept for the information of those who consult them.

1814.

HENRY
v.
LEIGH.

them. The entries are not made by one person in the course of his official duty, but by any of the clerks in the office; and none of them are sworn officers of the court.

The solicitor to the commission, who resides at Liverpool, and his agent in town, were afterwards called by the plaintiff. They stated, that they had been employed by the defendant to solicit his certificate under the first commission, and that looking at the entries they had made in their books of charges, they had no doubt the certificate was allowed by the Lord Chancellor.

Topping still insisted that this was not sufficient secondary evidence; particularly as it had never been proved that the certificate had come to the possession of the defendant.

Lord ELLENBOROUGH.—If the certificate was obtained for the defendant, I will presume that it came to his possession; and as he does not produce it upon notice, I think there is now abundant secondary evidence that the certificate was allowed. The issue joined is, that the defendant was not discharged under the statute before he became bankrupt as stated in his plea. He was so discharged if he obtained his certificate under a former commission. We have now legal evidence of the certificate being obtained. Therefore, as well on that issue as on the plea of non assumpsit, there must be a

Verdict for the plaintiff.

Garrow,

Garrow, A. G., Scarlett, and Campbell, for the plaintiff.

1813:
HENRY
v.
LEIGH.

Topping, Holroyd, and Littledale, for the defendant.

[Attornies, *Hutchison* and *Cooper*.]

Note.—Neither the first commiffion nor any of the other proceedings under it were produced.

COURT OF COMMON PLEAS.

ADJOURNED SITTINGS AFTER TERM AT
GUILDHALL.

REDMAN v. LONDON.

Tuesday,
December 22.

THIS was an action on a policy of infurance, dated 8th January 1813, on the ship *Sir Sidney Smith*, at and from London to Berbice.

A policy of infurance "at and from London to Berbice" was effected upon the receipt of a letter from the captain, (which was shewn to the underwriters,) stating that he had passed Barbadoes, and the words "at sea" were inserted in the policy after the printed clause

After the printed words in the policy, "beginning
" the adventure upon the said goods and merchan-
" dizes, from the loading thereof aboard the said
" ship," there were inserted, in writing, the words
" at sea."

describing the beginning of the adventure on the goods. Held, notwithstanding, that the policy was voided by a deviation at Madaira, in a former part of the voyage.

The

1813.

REDMAN

v.

LONDON.

The only extraordinary liberty given by the policy, was, "to join and sail with convoy, without being deemed a deviation."

This policy was on the same ship and the same voyage mentioned in *Williams v. Shee*, ante, 469. and exactly the same evidence was now given respecting the transactions at Madeira and the subsequent loss as upon the trial of that cause before Lord Ellenborough. The broker, however, swore, that when he effected the policy he shewed the underwriters a letter, written by the captain 'at sea,' when he was between Barbadoes and Berbice, stating that he had parted company with the convoy.

Best, Serjt., for the defendant, read the foregoing note of *Williams v. Shee*, and insisted that the present case was much stronger in favour of the underwriters, as the policy here did not contain the liberty to land, load, and exchange goods, which was there relied upon.

Shepherd, Serjt. for the plaintiff, allowed, that the ship had been guilty of a deviation at Madeira; but contended, that the underwriters on this policy could not take advantage of it. This policy was only meant to take the ship up "at sea" from the date of the last letter from the captain, and to protect her during the remainder of the voyage to Berbice. For this purpose, the words "at sea" were introduced into the policy. Their meaning might be a little equivocal on the face of the instrument, but became quite apparent when coupled with the letter shewn to the underwriters;

derwriters ; therefore a deviation prior to that letter was equally immaterial as a deviation upon any former voyage.

1813.
REDMAN
LONDON.

Best, Serjt. in reply. — It is impossible to make “ at sea ” one of the *termini* of the adventure. The policy is “ at and from London to Berbice,” and the declaration accordingly avers, that the ship was in good safety at *London*, and sailed from thence on the voyage in the policy of insurance mentioned. Had the ship sustained any secret damage at Madeira, the underwriters would unquestionably have been liable for an average loss. The date of a policy is wholly immaterial, if it be effected before the event is known to either party. The invariable rule is, that it attaches at the place where the risk is described to commence, and if not discharged by a deviation, protects the ship during the whole of the adventure. The captain’s letter cannot be made a part of this policy, which does not refer to it, and the words “ at sea,” connected as they are with the loading of goods and merchandizes, are wholly nonsensical.

MANSFIELD, C. J. — Whatever the intention of the parties might be, I see nothing in this policy to shew that it was not to attach at London. I must therefore hold, that the underwriters were discharged by the deviation at Madeira.

The plaintiff was nonsuited, and the nonsuit was afterwards confirmed by the Court of Common Pleas.

Shepherd, Serjt. and *Marryat* for the plaintiff.

Best, *Vaughan*, Serjts., and *Campbell* for the defendant.

[Attornies, *Rivington* and *Blunt*.]

1813.

REDMAN

LONDON.

But although a policy of insurance in general applies to the whole of the voyage specified in the policy, even where a part of it is performed before the policy is effected, yet it has been held, that if the assured have previously received a let-

ter from the captain, in which he omits to mention an accident that had befallen the ship in the prior part of the voyage, the underwriters are not liable for the damage thereby sustained. *Gladstone v. King*, 1 Maule & Selw. 35.

Wednesday,
December 22.

SCHNEIDER and another v. HEATH.

Although a ship be sold, "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale.

THIS was an action for money had and received, to recover back the deposit paid upon the purchase of a ship called the *Juno*, on the ground of misrepresentation and fraud on the part of the vendor.

The sale took place at Lloyd's Coffee-house on the 23d of July last, when a particular was exhibited by the defendant, describing the ship in the following terms :

"British-built at Monkwearmouth in 1810, for private use; 129 tons per register; is a clever, burthenfome, useful vessel for general purposes; unusually well found in stores, among which are a new cable and hawser never wetted, and a large proportion of entirely new sails: *the hull is also nearly as good as when launched*; requiring a most trifling outfit. Now lying off No. 3. Warehouse, London Docks. Hull, masts, yards, standing and running rigging, *with all faults as they now lie.*"

After

After this description of the ship followed an inventory of the anchors, cables, sails and ship's stores, provisions and boats, and at the end of this inventory was the following declaration :

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 SCHNEIDER
 and another
 v.
 HEATH.

“ The vessel and her stores *to be taken with all faults*, as they now lie, without any allowance for weight, length, quality, or any defect whatever.”

The vessel was purchased by the plaintiff for £1580. and he immediately paid the deposit of £397. 2s. which he now sought to recover.

Having taken possession of her, he sent her to a shipwright's to be examined. Here it was found that her bottom was worm eaten, that her keel was broken, that she was quite unseaworthy, and that she by no means corresponded with the description in the particular. The plaintiff thereupon refused to complete the purchase, and demanded back his deposit.

It now appeared in evidence, that the ship belonged to a club of underwriters, to whom she had been abandoned, and on whose account she was sold ; that the state of her bottom and her keel must have been known to the agents employed to conduct the sale ; and that the captain, when the ship was advertised for sale, took her from the ways on which she lay, and where the state of her bottom and her keel might easily have been discovered, and kept her constantly afloat, so that these defects were completely concealed by the water. The person who had framed the particular

1813.
 SCHNEIDER
 and another

v.
 HEATH.

ticular stated, that he had inserted the description of the vessel without having examined her.

Shepherd, Serjt., for the defendant, contended, that the action could not be maintained, as the ship and her stores, according to the particular, were to be *taken with all faults*. These words put the purchaser on his guard, and threw upon him the risk of all faults, latent and apparent, known and unknown. It was the duty of the plaintiff to have examined the ship's bottom and the state of her keel before the sale. The vendors had introduced words to obviate all subsequent disputes, and the plaintiff could not now come and complain of his own negligence.

MANSFIELD, C. J.—The words are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud, either in a false representation, or in using means to conceal some defect. I think the particular is evidence here by way of representation; that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent tells us, he framed this particular without knowing any thing of the matter. But it signifies nothing, whether a man represents a thing to be different from what he knows it to be, or whether

ther he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false. — But besides this, it appears here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who is to be considered the agent of the owners; and he, evidently to prevent their being discovered by persons disposed to bid for her, removed her from the ways, where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, I am of opinion that the plaintiff is entitled to recover back his deposit.

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 SCHNEIDER
 — O.
 HEATH.

Verdict accordingly.

Best, Vaughan, Serjts. and *Scarlett* for the plaintiff.

Shepherd, Serjt. and *Taddy* for the defendant.

[Attornies, *Daves and Palmer & Co.*]

Vide *Mellish v. Motteux*, Peak. Caf. 115. *Baglehole v. Walters*, 3 Camp. 154.

CASES

ARGUED AND DECIDED AT

NISI PRIUS

IN K. B.

At the Sittings after Hilary Term,

54 GEORGE III.

Thursday,
Feb. 17.

KEMP v. DERRETT.

Where premises are taken under an agreement by which the "tenant is always to be subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months notice to quit, expiring at the same time of the year it commenced, or any corresponding quarter day.

But although the tenant under such an agreement enters in the middle of one of the usual quarters, if there appears to be no agreement to the contrary, he will be presumed to hold from the day he enters; and the tenancy can only be determined by a notice

THIS was an action of debt to recover double the yearly value of a part of the *Angel Inn* at Islington, which the defendant was alledged to have unlawfully held over after the determination of a notice to quit.

The defendant became tenant of the premises to the plaintiff on the 29th of October 1810. The agreement between them was, "that the defendant was always to be subject to quit at three months notice." The defendant had a three months notice to quit at last Christmas, or to pay double value, but has nevertheless continued in possession.

Park contended, on the authority of *Doe d. Pitcher v. Donovan*, 1 Taunt. 555, 2 Campb. 78, that the three months notice to quit must expire at the season of the

expiring that day of the year, or some other quarter day calculated from thence.

year

year when the tenancy commenced ; and that at any rate it must expire on the 29th October, or some other quarter day corresponding with that date.

1814.

KEMP

v.

TERRITT.

Garrow, A. G., said, the tenancy in *Doe v. Donovan* was from year to year, whereas in this case, it must be taken to be from three months to three months ; and that though the defendant entered on the 29th of October, he must be considered to have held from the preceding or succeeding quarter day on which rents are usually paid.

LORD ELLENBOROUGH.—This does appear to me to be a holding from three months to three months : Therefore a notice to quit, expiring at the end of any quarter from the time of his entry, would have been sufficient to determine the tenancy.—I am quite clear, however, that the notice should have expired on the 29th January, 29th April, 29th July, or 29th October. The defendant might have been made to hold from the preceding or succeeding general quarter day ; but in the absence of all evidence to the contrary, I must presume, that he held from the time when he entered as tenant.

Garrow and *Espinasse* for the plaintiff.

Park and *Reader* for the defendant.

[Attornies, *Evans* and *Cocker*.]

Thursday,
Feb. 17.

FENN d. PHILLIPS v. COOKE and Another.

In ejectment, where the defendant comes in as landlord, it is necessary to shew that he is in the receipt of the rents and profits of the premises to which the lessor of the plaintiff makes title, or that the declaration in ejectment was served upon the tenant in possession of these premises.

EJECTMENT for a house at Brompton, which had been demise^d by *Phillips* from year to year to one *Flinn*, and when the ejectment was brought was in the possession of another person of the name of *Hodgson*. The defendants came in as landlords. It was stated that *Flinn* had become bankrupt, and that the defendants were his assignees; but there was no proof of this; nor could any evidence be adduced to connect the defendants either with *Flinn* or with *Hodgson*. — The lessor of the plaintiff rested his case on proving the tenancy of *Flinn*, and a notice to quit served upon him and upon *Hodgson*, without shewing the service of the ejectment.

The objection being taken, that there was no evidence that the defendants were landlords of the premises to which the lessor of the plaintiff had made title,—

It was contended, that the defendants were estopped from taking this objection, by coming in to defend as landlords. But—

LORD ELLENBOROUGH said, there was nothing to connect them with the premises demise^d to *Flinn*. It did not appear that these were the premises of which they claimed to be landlords. No evidence had been given that these were the premises for which the ejectment was brought, and which the defendants claimed

as landlords. The lessor of the plaintiff should either have proved that they were *Flinn's* assignees, or that the ejectment had been served upon *Hodgson*, the tenant in possession.

1814.
FENN d.
PHILLIPS
v.
COOKE
and Another.

Plaintiff non-suited.

Walton for the lessor of the plaintiff.

Jervis and *J. Parke* for the defendants.

[Attornies, *Tomlinson* and *Vizard*]

Vide Doe d. *Schofield* v. *Alexander*, post. 516.

SMITH v. RALEIGH.

Friday,
Feb. 18.

ASSUMPSIT for the use and occupation of a house and garden. Plea, the general issue.

It appeared, that after the defendant had agreed to take the premises at an entire rent, and possession had been delivered to him, the plaintiff railed off a part of the garden, and built a privy upon it, for the use of a number of his other tenants. The defendant thereupon returned the keys to him.

Where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to an action for use and occupation.

Lord ELLENBOROUGH ruled, that this amounted to an eviction from part of the demised premises; which,
the

1814.
SMITH
v.
RALEIGH.

the taking being single, and the rent entire, he considered a complete answer to the action.

Plaintiff non-suited.

Topping and Puller for the plaintiff.

Garrow, A. G., for the defendant.

[Attornies, *Vincent and England.*]

This case was recognized by DALLAS J., in *Stokes v. Cooper, Worcester Lent Assizes, 1814*, in which the rule was laid down, that after eviction from part, the landlord cannot recover upon the original contract, and the tenant, by giving up pos-

session of the residue, is entirely discharged; but that if the tenant, after the eviction, continues in possession of the residue, he may be liable upon a quantum meruit. *Vide Dalton v. Reeve, 1d. Raym. 77. Clun's Case, 10 Rep. 128.*

Friday,
Feb. 18.

LAWRENCE, Widow, v. OBEY.

If an ancient window has been completely shut up with brick and mortar above twenty years, it loses its privilege.

An Action for a nuisance to a house cannot be maintained for that which was no nuisance to the house before a new window was opened in it by the plaintiff, and which becomes a nuisance only by that act.

THIS was an action on the case, for erecting a privy in the defendant's house, which was a nuisance to the adjoining house of the plaintiff.

It appeared that this privy, when first erected, was no nuisance whatever to the plaintiff; but she afterwards struck out a window in the wall of her house immediately over it; and that unpleasant smells were then introduced into the house through this window from the privy. There was the mark of an old window in the place where this window was struck out; but

but it had been filled up with brick and mortar above twenty years before the privy was erected.

1814.
LAWRENCE
v.
OBE.

Lord ELLENBOROUGH held, that from the window having been shut up for twenty years, the case stood as if had never existed; and that the plaintiff having brought the nuisance upon herself, by opening the window, had no right of action.

Plaintiff non-suited.

Topping, Espinasse, and W. E. Taunton, for the plaintiff.

Parke, Lawes, and Courthope, for the defendant.

[Attornics, *Martindale and Jones*.]

CUTHBERT v. GOSTLING.

Friday,
Feb. 18.

TRESPASS for breaking through the wall of plaintiff's house. Pleas, not guilty, and a licence; to which there was a new assignment of excess.

Where to trespass for breaking through the wall of the plaintiff's house, the defendant pleaded a licence, to which the plaintiff new assigned *excess*; it appeared that the plaintiff had given the defendant leave to do what was necessary for repairing his own house, which adjoined the plaintiff's; and it was held,

It appeared that the trespasses complained of had been committed in repairing the defendant's own house; and his defence was, that having obtained the plaintiff's leave to do what was necessary in repairing it, nothing more had been done. To establish this, he proposed to call the workmen employed by him in doing the work.

that the workmen employed to do the repairs were competent witnesses for the defendant to disprove the excess, without a release.

A. Moore

1814
CUTHBERT
v.
GOSTLING.

A. Moore for the plaintiff contended, that they were incompetent witnesses without a release, as if they had been guilty of any excess, and the plaintiff should recover in this action, they would be liable over to the defendant. But—

Lord ELLENBOROUGH said, it by no means followed that they would be liable to the defendant, if the plaintiff had a verdict; nor did it appear that they were at all interested in the event of the suit. The case was quite different from an action for the negligence of servants in driving against carriages, or running down ships; for there, if the master be liable to the plaintiff, the servants are necessarily liable to the master; and they have a direct interest to defeat the action.

The workmen were accordingly examined; and the defendant had a verdict.

E. Moore and *E. Lawes* for the plaintiff.

Topping and *Puller* for the defendant.

[Attornies, *Jones* and *Vinceut*.]

Saturday,
Feb. 19.

DOE d. SCHOFIELD and Others v. ALEXANDER,
Widow.

In ejectment where the defendant comes in as landlord, to connect him with the premises to which the lessor of the plaintiff makes title, it is enough to shew that the declaration in ejectment was served upon the tenant in possession of these premises.

THIS was an ejectment by the assignees of one *Wells*, a bankrupt, to recover possession of a house and premises of which he was seized in fee, and which he

had

had conveyed to the defendant on the eve of his bankruptcy, by a deed which was contended to be fraudulent.

1814.
DOE d.
SCHOFIELD
v.
ALEXANDER.

The lessors of the plaintiff having made out their title, proved, that the ejectment was served upon a person of the name of *Hart*, who was then in possession of the premises, and gave in evidence the rule of Court in the common form, whereby the defendant was allowed to come in to defend as landlady.

Topping for the defendant insisted, that it was necessary to prove that *Hart* held the premises as her tenant, and cited *Smith d. Taylor v. Mann*, 1 *Wils.* 220, where it was held, that where the landlord is made defendant, “ it is necessary to prove the defendant, or his *tenant* “ in possession of the premises; for the rule is, that “ the landlord shall defend for the premises only “ whereof his tenants are in possession; and the party “ does not admit himself to be landlord of any premises which the plaintiff may make title to, but of “ such only as were in possession of those tenants.” This case is recognized in *Goodright d. Balch v. Rich*, 7 *T. R.* 327, in which it was decided, that in the common case, where the tenant in possession defends, the lessor of the plaintiff is bound to prove him in possession of the premises, notwithstanding the rule to confess lease, entry and ouster.

LORD ELLENBOROUGH.—Where the defendant comes in as landlord, I think he must necessarily be taken to acknowledge that he is landlord of the premises for which the ejectment is brought. He does
not

1814.

DOE d.
SCHOFIELD
and Others
v.
ALEXANDER.

not acknowledge himself to be landlord of any premises to which the lessor of the plaintiff may make title. But it seems preposterous to allow him to deny that he is landlord of those premises, of which the lessor of the plaintiff would have recovered possession by judgment against the casual ejector, if he had not interposed. Shall he be permitted to say first, "I am landlord of these premises, to which you have no right of entry;" and then, the right of entry being proved, "the person in possession is not my tenant, and I have nothing to do with them." All that is necessary I conceive is, to prove the identity of the premises for which the defendant comes in to defend as landlord; and that is sufficiently done by proving the service of the ejectment upon the tenant in possession. Here the lessors of the plaintiff have shewn what premises they go for in this action, by proving the service of the ejectment upon *Hart* while in possession of them; and the defendant is concluded by having come in and claimed to defend for them as landlady.

The lessors of the plaintiff had a verdict.

Garrow, A. G., and *Marryat*, for the lessors of the plaintiff.

Topping and *Littledale* for the defendant.

[Attornies, *Gale* and *Shaw*.]

Vide Fenn d. Phillips v. Cooke, ante 512.

DODD v. NORRIS.

Saturday,
Feb. 19.

THIS was an action for seducing the plaintiff's daughter *per quod servitium amittit*.

In an action for seducing the plaintiff's daughter *per quod servitium amittit*, the daughter is not bound to answer in cross-examination, whether she had not previously been criminal with other men.

The daughter having been called as a witness for the plaintiff, was asked in cross-examination, whether before her acquaintance with the defendant she had not been criminal with other men?

In such an action evidence cannot be admitted that the defendant accomplished the seduction by means of a promise of marriage.

LORD ELLENBOROUGH said this was a question she was not bound to answer; and that the point having been referred to the Judges, they were all of the same opinion.

Nor does the mere cross-examination of the daughter to shew that she had been guilty of improper conduct, entitle the plaintiff to call other witnesses to her character.

She was afterwards cross-examined at considerable length, to shew that she had submitted herself to the defendant's embraces under circumstances of extreme indelicacy, and had been guilty of great levity of conduct.

In re-examination she was asked, whether the defendant had not previously given her a promise of marriage?—This was objected to as an improper question.

Garrow, A. G., allowed that it was not competent to him to put this question in the examination in chief, but insisted, that after the cross-examination it became material to shew that she had admitted the familiarities of the defendant, in the prospect he had held out to her of becoming his wife.

1814.

DODD

v.

NORRIS

Lord ELLENBOROUGH.—I think you may ask her whether he paid his addressee to her in an honourable way. Farther than that you can on no account go. To admit evidence of a direct promise of marriage, would be to allow the mother to recover damages for a breach of that promise, upon the testimony of the daughter.

Garrow, A. G., then proposed to call witnesses to the character of the daughter, which he said had become necessary, by the course of the cross-examination. But—

Lord ELLENBOROUGH ruled, that he was not at liberty to do so, as no evidence of her bad character had been given on the part of the defendant. The questions put to herself in cross-examination there was an ample opportunity of explaining, as far as the truth would permit, when she came to be re-examined.—His Lordship observed, that the law considered this an action of trespass for assaulting the daughter, whereby the parent lost her service; and although by some anomaly, when the loss of service was established, a further compensation was allowed for the injury to the parental feelings, it was necessary to watch that this anomaly should not be carried farther, and that the original scope of the action should not be entirely lost sight of.

The plaintiff had a verdict for £75.

Garrow, A. G., and *Bewan*, for the plaintiff.

Park for the defendant.

Attornies, Price and Finchett.]

Vide Bamfield v. Massey, : Campb. 460.

KEIGHTLEY v. BIRCH and Another.

Saturday,
Feb. 19.

THIS was an action against the late Sheriffs of London for improper conduct in the execution of a writ of *fi. fa.* whereby they were directed to levy the sum of £45. upon the effects of *J. Smith*, besides poundage, &c. The return was, that they had taken goods and chattels of *Smith*, of the value of £72. 15s. 10d.; that they had paid several sums, amounting to £34. 3s. 7d. for King's taxes, &c. and the residue of the money levied, viz. £38. 12s. 3d. they had paid to one *Beveridge*, the landlord of the premises, for arrears of rent.

In an action against the sheriff for an improper return to a *fi. fa.* which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, it is not enough for him to prove that he paid the money to the landlord; but he should adduce some evidence that the rent was due.

For this purpose, the landlord of the premises is not a competent witness.

The sheriff having taken goods in execution under a *fi. fa.* is not justified in selling them to the highest bidder greatly under their value; but if he cannot obtain a reasonable price, should return that they remain in his hands for want of buyers.

The execution went in the 23d of March last. On the 24th, *Beveridge*, the landlord, distrained upon the goods for £62. being five quarters rent alleged to be due. A man remained in possession under the distress for three days, and then withdrew, having given notice to the sheriffs' officer of the landlord's claim. The goods, which were sworn to have been worth between £300. and £400. were afterwards sold by the sheriffs by public auction for £72. 15s. 10d. The sums mentioned in the return for taxes, &c. were then paid, and the remaining £38. 12s. 3d. was handed over to *Beveridge*, the landlord. *Smith*, the defendant in the execution, being called, swore that he had paid all arrears of rent at the preceding Christmas, and that at the time of the execution there was no rent due. Upon these facts it was con-

1814.
 KEIGHTLEY
 v. —
 BIRCH
 and Another.

tended, that the sheriffs were liable, 1st, for paying the money to the landlord when there was no rent due; and, 2dly, for selling the goods so much under their value; whereas, had they been properly sold, they were more than sufficient to satisfy both the landlord and the judgment creditor. The declaration contained counts adapted to both these grievances.

Garrow, A.G. with regard to the first, insisted, that it was immaterial to the Sheriffs whether the rent was due or not, if they had acted *bona fide*, and the rent had been demanded of them. By 8 Ann. c. 14. they were bound to pay a year's rent to the landlord before removing the goods from the premises. If a year's rent was demanded of them, they had no means of knowing whether or not it was due. If they refused to pay it, they were liable to an action at the suit of the landlord. Therefore, all that the law could require of them was, that they should act with good faith, and according to a sound discretion. Here not only was there a demand for rent, but a distress for, five quarters, at the rate of £50. a-year, actually came in, while they were in possession of the goods upon the premises; they were therefore bound to pay one year's arrears, as far as the sum levied would go, after incidental charges were defrayed; and if the rent was not due, the plaintiff's remedy was against the landlord—in *case* for a deceitful representation, or *assumpsit* for money had and received.

Lord

Lord ELLENBOROUGH. I am of opinion that the sheriffs are liable in this action, if there was no rent due. They might have required reasonable evidence from the landlord (such as a sight of the lease) that the rent was due before they paid him the money. Sheriffs are often placed in very difficult circumstances, and must act at their peril. When they proceed *bonâ fide*, they will be indulged with time to make a return till an indemnity is offered; but they must establish the truth of their return when it is once made. The statute of Anne only authorizes the sheriff to pay to the landlord such arrears of rent *as are or shall be due*. The defendants, therefore, ought to give some evidence that a sum of £38. 12s. 3d. was due for rent from *Smith to Beveridge*. I should be satisfied with slight evidence of this fact to make out a *prima facie* case in their favour. But, on the contrary, we have positive evidence that no rent was due.

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 v.
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 and Another.

Garrow, A. G. then proposed to call *Beveridge*, the landlord, to prove the rent due; but Lord Ellenborough held that he was an incompetent witness, as, if the present action succeeded, he would be liable to an action at the suit of the sheriffs, in which this judgement would be evidence of special damage.

Garrow, A. G. upon the second ground, insisted that the sheriffs could not be liable, as they had sold the goods by public auction, for the highest price they would fetch.

Lord ELLENBOROUGH. If the goods taken in execution really were worth £300. or £400., I think

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the sheriffs are liable for selling them for £72. 15s. 10d. The return ought to have been, that they had taken goods which remained in their hands for want of buyers. If a chattel worth £1,000. is put up to sale, and only £5. is bid for it, the sheriff ought not to part with it for that sum, and he may fairly say that it remains in his hand for want of a buyer. He ought to wait for a *venditioni exponas*, the meaning of which is "sell for the best price you can obtain."

The Jury found for the plaintiff, damages £45.

Topping and *Espinasse* for the plaintiff.

Garran, A. G., and *Long*, for the defendant.

Vide *Leader v. Danvers*, 1 Bof. & Pul. 359.

ADJOURNED SITTINGS AT GUILDHALL.

Friday,
 Feb. 25.

DITCHAM v. BOND.

To trespass for breaking and entering the plaintiff's house, and making a noise and disturbance therein, the defendant pleaded

a licence, to which the plaintiff replied *de injuria*.—*Held*, that the plea was supported by evidence that the plaintiff kept a billiard table in the house, at which all persons were usually permitted by him to play at regulated prices, and that the defendant entered the house for the purpose of going to the billiard room; although while in the house he was guilty of a trespass in assaulting the plaintiff.

The

The defendant pleaded to breaking and entering the house a licence, with other pleas to the rest of the declaration.

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Replication to all the pleas, *de injuriâ*, &c.

It appeared that the plaintiff keeps several billiard tables in his house, at which all persons may play, paying certain regulated prices by the game or hour. There is no board or sign on the outside of his house, stating that billiard tables are kept there; but the outer door always remains open, and gentlemen walk up stairs to the billiard rooms, if any happen to be disengaged, or if not, they wait in a parlour below. On the 18th of May the defendant entered the house, and insisted on walking up stairs to the billiard rooms, although they were all engaged; struck the plaintiff, who wished to prevent him, and made a great disturbance in the house for a considerable while after.

It was insisted for the defendant, that he was entitled to a verdict on the plea of licence, as the plaintiff must be supposed to have consented to all persons entering the house for the purpose of playing at billiards. The defendant might have been guilty of some excess; but that could not be taken advantage of for want of a new assignment.

On the other side it was contended, that the keeping of billiard tables under these circumstances was no evidence of licence, and that at any rate the defendant by his subsequent conduct had made himself a trespasser *ab initio*.

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LORD ELLENBOROUGH.—I think the plaintiff was bound to new-assign. The keeping of a billiard table amounts to a licence given by the party. The distinction is taken in the *Six Carpenters Case* (a) between a licence given by the party and a licence given by the law. If the defendant exceeds the latter, as by committing a trespass in an inn, he is a trespasser *ab initio*; but an excess of the former must be taken advantage of by new assignment.

The plaintiff had a verdict, with £5. damages for the assault upon himself and his servant.

Garrow, A. G., and Crofts, for the plaintiff.

Park and Campbell for the defendant.

[Attornies, *Latimer and Osbaldeston.*]

(a) 8 Rep. 146. a.

In the ensuing term a motion was made to arrest the judgment in this case, on the ground that the plaintiff could not join in the same declaration a count for assaulting himself, and a count for assaulting his servant, *per quod servitium amisit*; but the

Court held, that an action for beating the plaintiff's servant *p. q. f. a.* is properly an action of trespass, and may be well joined with counts for assaulting and beating the plaintiff himself, or breaking and entering his house.

WILSON v. FREEMAN.

Monday,
Feb. 28.

THIS was an action against the defendant as a carrier, for negligence in the carriage of a looking-glass from London to Bilderstone, in Suffolk, whereby it was broken.

The looking-glass packed in a case, directed to the plaintiff, and marked "glass," was delivered to the defendant's book keeper at the Saracen's Head, Snow Hill. The book-keeper being told what it was, said he should charge four cwt. for it, although in point of fact it weighed but three. The person who brought it answered, "Charge what you please; you shall be paid for it, provided you take care of it. It is worth £80. It is in your care, and I am done with it." No money was then paid, except 6*d.* for booking. The looking-glass, when unpacked in Suffolk, was found to have been broken on the journey.

Notwithstanding a notice by carriers that they will not be accountable for goods of a particular description, above the value of 5*l.* "unless specified and paid for as such when delivered;" held that they were liable for damage done to an article of this description, much above the value of 5*l.* although not paid for as such when delivered, their book keeper having been then informed of its value, and desired to charge for it what he pleased, which should be paid, provided it was taken care of.

The defence was rested upon the effect of a notice stuck up in the defendant's waggon office, intimating that the proprietors "would not be accountable for any China, glass, or contents, plate, watches, cash, bank notes, bills, jewels, or writings, however small the value, nor for any other article of more than £5. value, if lost or damaged, unless specified, *and paid for as such when delivered* at their offices in town or to their agents in the country." Here nothing had been paid for the looking-glass when it was delivered, and the defendant therefore was not accountable for the damage it had sustained.

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Lord ELLENBOROUGH held, however, that as the book-keeper knew what the article was, and was told its value, and was desired to charge what he pleased, the payment of the money was dispensed with, and the notice was unavailing.

Verdict for the plaintiff.

Garrow, A. G., Holroyd, Alderson, and Erskine,
for the plaintiff.

Park and Comyn for the defendant.

[Attornies, *Chisholm and Pope.*]

Vide Beck v. Evans, ante 267.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

Coram CHAMBRE, J.

HART and Another v. SATTLE.

If goods are ordered verbally, the delivery of them to a carrier

THIS was an action for goods sold and delivered, to recover the price of a hogthead of gin.

is sufficient to bind the contract according to the statute of frauus, where the purchaser has been in the habit of receiving goods from the vendor by the same mode of conveyance.

The

The plaintiffs are spirit-merchants in London, who had been in the habit of supplying spirits to the defendant, a publican near Dartmouth in Devonshire. In these previous dealings the course had been for the plaintiffs to ship the goods on board a Dartmouth trader in the river Thames, and the defendant had always received them. The hoghead of gin in question was verbally ordered by the defendant of the plaintiffs' traveller, and was shipped in the same manner as the others had been. There was no evidence either that it had been delivered to the defendant in Devonshire, or that he had refused to accept it.

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and Another
v.
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Lens, Serjeant, for the Defendant, contended, there was no sufficient contract here, according to the 17th section of the Statute of Frauds, which in a case like this, where the delivery of the goods is relied upon, requires that "the buyer shall accept part of the goods sold, and actually receive the same."

CHAMBRE, J.—I think under the circumstances of this case, the defendant must be considered as having constituted the master of the ship his agent to *accept and receive the goods*.

Verdict for the plaintiff.

Best, Serjeant, and *Richardson*, for the plaintiff.

Lens, Serjeant, for the defendant.

[Attornies *Lane* and *Price*.]

Vide Kent v. Huskinson, 3 Bof. & Pul. 233. Elmore v. Stone,
1 Taunt. 458.

Coram

 Coram GIBBS, C. J.

HOLROYD and Others, Assignees of HALL, a Bankrupt,
v. WHITEHEAD and Others.

Where a trader departs from his dwelling house on account of domestic dissensions, if he makes no arrangements for carrying on his business in his absence, and he foresees that as a necessary consequence his establishment must be broken up, and his creditors must be delayed, which events accordingly happen; he thereby commits an act of bankruptcy.

Stat. 19 Geo. 2. c. 32. only protects payments in respect of bills of exchange after a secret act of bankruptcy, where the bankrupt was liable on the bills to the party receiving the money.

MONEY had and received.

The bankrupt was a hosier in Basinghall-street. On Wednesday the 5th of August 1812, he departed from his dwelling-house, having left behind him a letter directed to his wife, in which he says, that he had taken leave of her for ever, and that certain supposed misconduct of hers had driven him away. He observes, she would soon be turned out by his creditors; that there would be 20s. in the pound for them; but that, be it less or more, he had done with it. He concludes by desiring her to see that no one took goods out of the warehouse in preference. Before going, he gave no directions for carrying on his business during his absence. He returned for a short time in the evening of Saturday the 8th. In the mean time, a creditor had called for money, and was obliged to go away unsatisfied. The bankrupt was several hours at home on the Sunday. He returned again early on Monday morning, and sat the greater part of that day in a retired room above stairs, where he had not been accustomed to sit except when he was unwell. On the Tuesday he was denied to a creditor by his own orders; and a commission of bankrupt soon after issued against him.

The

The defendants were his bankers. On the Saturday, without knowledge of his insolvency, they had paid a bill of exchange for £300, accepted by him, payable at their house, for which they had no funds of his in their hands. For the purpose of reimbursing them, he sent them, at nine o'clock on the Monday morning, the £250, to recover which this action was brought.

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 v.
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Shepherd, S. G., for the defendants, contended, 1st, that there was no act of bankruptcy before the payment of the money; and 2dly, that the payment was protected by 19 Geo. 2. c. 32.—1. The bankrupt departed from his dwelling-house on the Wednesday, not with intent to delay his creditors, but because he had quarrelled with his wife. He says there was 20s. in the pound for them all, and there is no proof that his conduct was at all influenced by pecuniary embarrassments. Suppose that on the Saturday, having repented of his separation from his wife, he had returned and continued regularly to carry on his business, could it be said that he had committed an act of bankruptcy? Surely the effect of his conduct could not be determined by what took place in the following week. 2. The defendants were “really and bonâ fide creditors of the bankrupt in respect of a bill of exchange really and bonâ fide accepted by such bankrupt in the usual and ordinary course of trade and dealing.” Therefore they were not “liable to refund to the assignees of such bankrupt’s estate the money which, before suing forth the commission, was really and bonâ fide, and in the usual and ordinary course of trade and dealing, received by them of the bankrupt before

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before such time as they knew he was become a bankrupt, or that he was in insolvent circumstances." They were his creditors, in respect of the bill of exchange for £300. which he had accepted payable at their house; and the payment of the £250. to reimburse them, was in the ordinary course of trade and dealing. The case comes within the very words as well as spirit of the act of parliament.

GIBBS, C. J. observed, that the bankrupt might be considered to have committed an act of bankruptcy by departing from his dwelling-house on the Wednesday, although the step which he took arose chiefly from domestic dissensions. He evidently contemplated his trading, as at end. He had no intention to return. He left no directions how the business was to be carried on in his absence. He desired that no preference should be shewn to his creditors. One of them called while he was away, and appears to have been delayed. It was not enough that he left his property behind, even if he believed that it would produce 20s. in the pound to all his creditors. They had a right likewise to his person. Where creditors have been delayed, the trader has been held to have committed an act of bankruptcy, although that was not his principal motive, as he must be supposed to foresee and intend the necessary consequences of his own act.—Upon this part of the case, the Chief Justice directed the jury to say, whether they believed that the bankrupt left his house with intent to delay his creditors, and whether they found as a fact that a creditor was thereby delayed. His lordship observed, that in his own opinion there was a sufficient act of bankruptcy, if the bankrupt

bankrupt left his house with intent to delay his creditors ; but he wished to give an opportunity to take the opinion of the Court upon this question, if the jury should think that no creditor was in point of fact delayed (a).—With regard to the second point, he expressed himself clearly of opinion, that the payment, if made after an act of bankruptcy, was not protected by the statute. He considered the 19 G. 2. c. 32. only to apply to goods sold, or to cases where the bankrupt was liable on the bill of exchange to the party receiving the money. The defendants in this instance were not creditors of the bankrupt on a bill of exchange, but for money lent, or for money paid at his request. The £250 was sent to them as the re-payment of a loan, and not to discharge the bankrupt's liability to them on a bill of exchange (b).

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The jury found, that the bankrupt left his house with intent to delay his creditors, and that a creditor was thereby delayed ; and the plaintiffs recovered the amount of their demand.

Lens, Serjt., and *Campbell*, for the plaintiffs.

Shepherd, S. G. and *Best*, Serjt. for the defendants.

[Attornies, *Holt & Farren* and *Palmer & Co.*]

(a) *Robertson v. Liddell*, 9 East, 487.

(b) See *Tamplin v. Diggins*, 2 Campb. 312,

Wednesday,
March 2.

RALPH ADAMS and Others v. MALKIN and Another.

An attorney cannot be made a bankrupt as a money scrivener, unless he has been in the habit of having money deposited with him for the purpose of laying it out on securities.

THIS was an issue directed by the Lord Chancellor to try whether one *Samuel Thomas Adams*, against whom a commission of bankrupt issued, bearing date 21st April 1812, was at the time of the date and issuing of the said commission of bankrupt against him, a trader, as being a money scrivener or broker within the several statutes relating to bankrupts, some or one of them.

The commission had been sued out by the plaintiffs, and the defendants were two creditors who petitioned to supersede it.

Samuel Thomas Adams, the bankrupt, for a number of years before his bankruptcy, and down to the time when that event happened, lived in Great Russell Street, Bloomsbury, where he carried on the business of an attorney and solicitor, acting for his clients, and making out his bills as attornies and solicitors usually do. The evidence relied upon, to shew that he was likewise a money scrivener, was in substance as follows : The plaintiffs, who are his relations and were brick and tile makers, having no banker of their own, used to deposit bills and money with him to have them lodged with his bankers ; but he did not lay out the money for them, and they received it back again as they wanted it.—He had authority from a *Mr. Hake* to speculate in the purchase of houses for him. He accordingly negotiated for *Hake* the purchase of a chapel in Oxendon-street, and of some freehold and leasehold houses in Pall Mall.—He was afterwards con-

cerned in re-selling part of these to a *Captain Cooke*. About £1,000. of *Captain Cooke's* purchase-money remained on mortgage, and the mortgage was prepared in the bankrupt's office. He received the interest on the mortgage, and the rents for some of the houses which remained unsold.—He was employed by *Captain Cooke* in the sale of some property, at Brompton, to a Mr. *Sandby*, and when the bills given in payment were dishonoured, he assisted in raising money to pay them.—He was likewise concerned in some pecuniary transactions between *Sandby* and the *Earl of Moira*, in the course of which, money passed through his hands, but none was deposited with him.—He sold a debenture on Drury-Lane Theatre for a Mr. *Maunde*, and negotiated an annuity for him. It did not appear that the money advanced as the price of the annuity was ever in his hands. He received money from *Maunde* to pay off the interest. He carried on a treaty for the redemption of the annuity, and was intrusted to deposit money at a banker's for that purpose.—He sold out stock for one *Paul*, and negotiated a loan for him, on the security of stock belonging to Paul and his wife.—One *Green* advanced him £100.; but although he had given a different account of it, this in truth was by way of loan, and interest was to be paid for the money.—The last transaction proved was with a Mr. *Jackson*, who employed him to negotiate a loan. The money was procured from *Sandby*, and passed through the bankrupt's hands.—He charged as an attorney for all the business he thus transacted.

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 and Others
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Shepherd, S. G., for the plaintiffs, contended, that upon these facts *S. T. Adams* was a money scrivener within

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within the meaning of the act of parliament. Although he was an attorney, he might likewise act as a scrivener; and if he did, he would not be less subject to the bankrupt laws than if he carried on the latter business exclusively. In modern times this business is not carried on by a separate class of men, but is generally conducted by attornies. The statute 21 James I. c. 19. renders liable to the bankrupt laws "all and every person or persons using or that shall use the trade of merchandize, &c. or shall use the trade or profession of a scrivener, receiving other men's monies or estates into his or her trust or custody." Therefore a scrivener appears to be a person entrusted with money, and who prepares securities, whether mortgages, annuity deeds, bonds, or other instruments. Mr. *Adams* acted in this character. Whether he was a trader or not, does not depend upon the number of instances of his trading. One or two instances, distinctly proved, are sufficient to bring him within the scope of the bankrupt laws. It is not necessary that he should seek his livelihood only as a scrivener. If that were so, no person could now be made a bankrupt in that character. But commissions of bankrupt are constantly sued out and sustained against attornies as money scriveners, they having been accustomed, in addition to their business as attornies, to receive other persons money, and to prepare securities in the manner pursued by Mr. *Adams*.

• *Best*, Serjt. *contra*.—*Adams* merely acted in the capacity of an attorney, and it would be extremely mischievous if a person acting in this manner were subject to the bankrupt laws. Attornies and solicitors do not,

as such, engage in those speculations which render their capital uncertain. They are not exposed to the hazards of mercantile men, and ought neither to be exposed to the severity, nor entitled to the benefits of the bankrupt laws. To make an attorney a trader as a scrivener, it is not enough that he prepares securities; he must receive "other men's monies or estates into his trust or custody." By preparing the securities he may be a scrivener; but he is not such a scrivener as the statute describes. Although it should appear that in the course of six or seven years, this gentleman might once, twice, or thrice have received other men's monies, that would not subject him to the bankrupt laws; there must be a habit of dealing as a money scrivener; he must have sought his living by it. An occasional receiving of money incidental to his business as an attorney is for this purpose immaterial. There is no attorney, and there is hardly a person in any other situation of life, who has not received other men's money into his possession; but no one is subject to the bankrupt laws by receiving money, who is not in the habit of receiving it as a money scrivener. In this case *Adams* is not proved in any one instance to have had other men's monies or estates in his trust or custody. He was merely employed to hand over the money from one person to another; it never remained in his possession for him either to use it or to lay it out. A servant might as well be considered a money scrivener, who pays money to tradesmen by his master's orders. The money scrivener referred to by the statute is a character which no longer exists. *Adams*, in all the transactions given in evidence, was employed and was paid as an attorney; he never charged brokerage or commission; he made out a bill for deeds

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and attendances like any other attorney. *Hamson v. Harrison, 2 Esp. Cas. 555.* is a strong authority to shew that neither Adams, nor any other attorney of the present day, can be made a bankrupt as a money scrivener. Lord Kenyon there says, "When the statute passed, the business of a scrivener was well understood; the statute had those particular persons in view who, *eo nomine*, carried on that business. The acts relied upon to constitute a scrivener must apply to persons who used to act as they did, not where a person receives and pays money as the bankrupt in the present case has done."

GIBBS, C. J.—The question is, whether *Samuel Thomas Adams*, against whom a commission of bankrupt issued on the 21st of April 1812, was on that day a trader as being a money scrivener. There is some difficulty at the present day in understanding correctly what a money scrivener is. There is no living character to refer to as an example. The business of a money scrivener, as it was formerly carried on, has been discontinued: it has been subdivided into different branches, which have been taken up by different descriptions of persons. Formerly the business was well known. The old books are full of cases arising out of the transactions of money scriveners; to these we must look to form an accurate judgment of the character intended by the legislature. After the statute of Elizabeth, and before the statute of James, it was considered doubtful whether a scrivener was subject to the bankrupt laws. The latter statute subjects to the bankrupt laws all those "who use the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody." Thus the per-

son to be considered a scrivener must carry on the trade or profession; it must be an occupation to which he resorts in order to gain his living. To be a scrivener within the meaning of the statute, he must likewise, in the course of this occupation, receive other men's monies into his trust or custody. It appears from the old cases, that before bankers and brokers were so easy to be found, the scrivener was the person with whom people were accustomed to deposit their money, in order that he might lay it out for them when he should find a proper opportunity. The scrivener, in the mean time, had the use of it, and could not be questioned for the profit he made of it till he laid it out; he was trusted as a banker. It was not a specific sum which in monies numbered he was to keep in his chest; he gave credit for it to the party, who had sufficient confidence in him that he would lay it out to advantage as soon as an opportunity offered. It was seen to be of great importance that this description of persons should be subject to the bankrupt laws; for through them the property of others was exposed to the risks of trade. They were trusted with other men's property as traders now are; and therefore it was of consequence to the public, that if any calamity happened to them, there should be the same summary means which had been before devised with respect to other persons in trade, of getting at their effects, and making an equal distribution among all their creditors. They were consequently included in the statute of James I. Since the period to which I have been referring, the business of a money scrivener has ceased. It is related in the life of Dr. Johnson, that a person who went by the name of *Jack Ellis* was the last of the profession. He was a co-temporary of Johnson, and is mentioned by

Answer
and Oath
to
Masters
and Apprentices

CASES AT NISI PRIUS,

1844.

v.

MILKIN

Another.

him with great respect (a). At the present day, the banker occupies one department of the business of the scrivener, by being the depository of the money, and the attorney the other, by drawing the securities. The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a money scrivener, though on particular occasions he incidentally has the money of his clients to lay out for them. In order to make a man a money scrivener, he must carry on the business of being trusted with other people's monies to lay out for them as occasion offers. It is not being sent with the money of his client, or receiving it from the person with whom his client may have previously contracted, that will make an attorney a money scrivener. In that part of the transaction, he is no more than a person employed to fetch and carry. Having negotiated the loan, and drawn the deeds, his happening to receive and pay the money, is incidental to his business of an attorney. Nor if on one or two occasions money were deposited with him to lay out, would that constitute him a money scrivener. He must be carrying on generally the business of a money scrivener. That must be part of his known occupation. I cannot

(a) JOHNSON.—“It is wonderful, Sir, what it to be found in London. The most literary conversation that I ever enjoyed was at the table of Jack Ellis, a money scrivener behind the Royal Exchange, with whom I at one period used to dine generally once a-week.”

Not by Boswell. This Mr. Ellis

was, I believe, the last of that profession called scriveners, which is one of the London companies, but of which the business is no longer carried on separately, but is transacted by attorneys and others. He was a man of literature and talents. *Boswell's Life of Johnson*, 3d Vol. p. 20.

express

express what I mean to convey more correctly than in the words of the present Lord Chancellor, in a case before him: "The next question is, as to the trading as a scrivener. That does not depend upon the fact, whether the bankrupt has or has not occasionally done acts which a scrivener peculiarly and properly would have done; not upon what he may have done upon one day and what upon another day; but upon his intention generally to get a living by so doing (a)." Though an attorney may have incidentally acted as a scrivener, that is not sufficient: Though money may have been deposited with him, for which he was afterwards to seek a borrower, a few insulated instances of that sort occurring in the course of his business as an attorney, would not bring him within the operation of the bankrupt laws; for that would not be "using the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody."

Looking now to the facts of this case, it appears that Mr. *Adams* merely acted as a common attorney. In the various transactions that have been spoken to, I can discover nothing which a common attorney would not undertake. It is said he acted as a money scrivener for the plaintiffs. They, being his relations, and having no bankers of their own, deposited money and bills with him to be lodged with his bankers. But he was not to lay out the money for them, and he cannot be said to have received it as a scrivener. In his dealings with *Hake*, *Cooke*, and *Sandby*, he merely negotiated the sale of estates, drew a mortgage deed, received rent, and assisted in procuring the loan of money.

(a) Ex parte Paterfon, 1 Rose, 402.

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Another.

It does not appear that he ever was intrusted with the money of these or any other persons to lay out for them at his discretion; although he was sometimes the hand employed by one party to deliver over the money to another, when it was advanced or when it was repaid: I take no particular notice of the instances in which it is stated that *Mr. Adams* negotiated the sale of estates; for it is ridiculous to suppose that the transaction of such common and ordinary business should constitute a man a money scrivener. If *Green* had, as *Adams* represented, deposited the £100. with him till he (*Adams*) could find a borrower, *pro hac vice* he would have been a money scrivener; and a course of dealing of that description would render him liable to the bankrupt laws, though one or two instances only would not have this effect. But it turns out that the money was advanced to *Adams* by way of loan, and that he was to repay it with interest to the lender. Then, as to *Maunde's* annuity, the money paid as the consideration for it does not appear ever to have been in *Adams's* possession, and the money with which it was to be redeemed, although it did pass through his hands, never was applicable to his own use. It is not immaterial to observe, that all his charges to his employers are the common and usual charges of an attorney. He charges for his trouble, whether his labours have been attended with a favourable or unfavourable result. However, I do not put the case upon that ground; for if he had even charged procuration money or commission, this, in my opinion, would not have made him a scrivener, unless he had been intrusted with money as money scriveners were accustomed to be when the statute passed. And I am inclined to think, that if he had been intrusted with money

money as money scriveners formerly were, he would still have been within the operation of the bankrupt laws, though he had not received procuration money or commission, and had made the usual charges for drawing the securities. The essential point to consider is, whether he had other men's monies or estates in his trust or custody as a scrivener (a).

Verdict for the defendants.

In the course of the trial Mr. *Hake* was offered as a witness for the plaintiffs. Being examined on the *voir dire*, he stated, that he was a creditor of *Adams* the bankrupt. The defendant's counsel having objected to his admissibility, —

Upon an issue to try the validity of a commission of bankruptcy, a creditor is not a competent witness to support the commission, although he does not appear to have proved under it.

Shepherd, S. G., contended, that not having proved under the commission, he had no interest to support it. In many instances a commission of bankruptcy is considered very disadvantageous to creditors. This very issue came on to be tried in consequence of the defendants, two of Mr. *Adams*'s creditors, having petitioned to supersede the commission. If a commission of bankruptcy be established, a creditor cannot obtain any fruits from a judgement at law; and if a certificate be obtained under it, his legal remedy is for ever barred. A distinction may likewise be taken between an action by assignees to recover property, and an issue to try whether the party was a trader; and a creditor may be admitted as a witness on the latter occasion, though not on the former.

(a) *Vide* Ex parte Warren, 2 Sch. & Le Fr. 414. Ex parte Malkin, 1 Rose, 406. Vin. Abr. tit. Scrivener, Vol. 19. p. 289. 8th. ed.

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GIBBS, C. J.—I am of opinion that the witness is incompetent. A commission of bankruptcy is evidently favourable to the creditors. A much more summary and effectual remedy is thereby given them than by an action at law; and as it passes the whole of the bankrupt's real as well as personal estate to the assignees, it immediately appropriates to the satisfaction of his debts that which can only be reached remotely and partially by common law process. I conceive, therefore, that a creditor has an interest to support the commission under which he may prove and receive a dividend. Then if he be incompetent as a witness where the object is to recover 40s. by the assignees, he cannot be less incompetent upon an issue which is to determine whether all the bankrupt's property real and personal shall be divided among his creditors.

The witness was rejected (a).

Shepherd, S. G., Onslow, Serjt., Richardson and Rose,
for the plaintiffs.

Best, Vaughan, Serjeants, and Campbell, for the
defendants.

[Attornies, *Adams and Hurd.*]

(a) In *Williams v. Stevens*, 2 Campb. 301. Lord ELLENBOROUGH is reported to have held that the creditor of a bankrupt who has not proved his debt under the commission is a competent witness to support the commission, although not to increase the estate. But this

case being cited before Lord ELLEN, his lordship said, "It is not enough that the creditor has not availed himself of the commission; to make him a competent witness, it ought to be certain that he never will." *Ex parte Osborne*, 1 Rose, 387. 392.

CASES AT NISI PRIUS.

[This case ought to have appeared amongst those decided after last Michaelmas Term.]

Coram MANFIELD C. J.

BELL and Another v. KYMER and Others.

Monday,
December 20,

THIS was an action of assumpsit for freight. The declaration contained several special and general counts, similar to those in *Wilson v. Kymer*, 1 M. & S. 157.

By a charter party under seal, bearing date the 26th of January 1809, the plaintiff chartered the ship *Hind* from Joseph and John Corbie, her registered owners, for a voyage from London to St. Domingo and back. The plaintiffs covenanted to provide a full homeward cargo for the ship, consisting of coffee and other goods, and to pay freight at the rate of 15s. per cwt. for the coffee, and for other goods in proportion, with 5 per cent. primage;—such freight and primage to be paid in manner following, viz. £800., part thereof, in and by a bill of exchange, payable in London two months after the day of the date of the ship's departure from Gravesend, and the remainder two months after the day on which she should be reported inward at the custom-house in the port of London.

Where a ship is chartered by a charter party under seal, which provides specifically for the payment of freight from the charterer to the owner, a person who receives goods carried by the ship in this voyage as indorsee of the bill of lading which makes them deliverable to order, or to assigns on payment of freight as per charter-party, is liable to pay freight accordingly, altho' he has paid over the proceeds of the goods to the person who indorsed the bill of lading to him before being called upon to pay the freight.

The ship having arrived at St. Domingo, took on board there 1,151 bags of coffee, shipped by J. N. D'Arcy,

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D'Arcy, for which the master signed a bill of lading, dated 6th June 1809, making them deliverable "unto order or to assigns, paying freight for the said goods as per charter party, with primage and average accustomed."

This bill of lading was indorsed by *D'Arcy* to *T. Goodall*, then acting as Admiral to *Christophe*, Emperor of Hayti, and by *Goodall* to *Wm. Fletcher*, his agent in London. *Fletcher* indorsed the bill of lading to the defendants, who immediately accepted bills for him to a considerable amount on the strength of the consignment. The goods were landed by the defendants, and afterwards delivered out from the warehouses of the West India Docks to their order. It did not distinctly appear in evidence how the goods had been entered in the books of the Dock Company, but it was taken as a fact on both sides, that the defendants got possession of them by virtue of the bill of lading.

The plaintiffs did not call upon the defendants for the freight till May 1810, there having been some misapprehension as to the persons to whom the goods belonged. In the month preceding, the defendants had paid over to *Fletcher* the sum of £4,000., being the balance due to him from the proceeds of the goods, without making any deduction for freight.

Shepherd, Serjt., contended, 1st, that under these circumstances the defendants never were liable for the freight; and, 2dly, that even if they once were, they had been discharged by the laches of the plaintiffs.

1st,

1st, The defendants in this case acted merely as brokers; in that character they landed the goods; the bills of lading were indorsed to them to enable them to do so. They were the mere agents of *Fletcher*, who was alone beneficially interested in the consignment. They sold the goods for him, and accounted to him for the proceeds. Upon him, alone, therefore, ought the demand for freight to have been made. This is entirely different from the case of *Cock v. Taylor*, 13 *East*, 399., where the goods were delivered out of the ship to the assignee of the bill of lading. Here there is no privity between the parties to the action, and no consideration for any implied promise to pay freight. The plaintiffs had no lien on the goods after they were landed and lodged in the warehouses of the Dock Company. There was an obvious and well known mode in which they might have preserved their lien, viz. by landing the goods in the name of the captain, and putting a *stop* upon them till the freight was paid. By permitting the goods to be landed according to the manifest, they waived their lien, and could only resort to those who could be considered as having entered into an express contract to pay the freight. If the defendants were liable, a claim for freight might as well be set up against the grocer who purchased the goods from the docks, or the consumers to whom they were ultimately delivered.* 2dly. But supposing that the defendants were once liable, it would be extremely unjust to call upon them for the freight after they had paid over the whole of the proceeds of the goods to their principal. If they were to be looked to, a demand ought to have been made upon them at the end of

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two months from the delivery of the ship; the usual time for freight to be paid according to the usage of the port of London. No such demand being made upon them, the defendants were naturally led to believe that the freight had been paid by some other person.—

Mr. Noble, one of the Special Jury.—They ought to have enquired whether the freight was paid before paying over the proceeds of the goods.

MANSFIELD, C. J.—To be sure they ought.

Shepherd, Serjt.—They were deceived by the laches of the plaintiffs. No application for freight having been made to them till May 1810, they must be considered as having authority to pay the proceeds to *Fletcher*, and they were in the situation of agents, who without notice have paid over a sum of money to their principal.

MANSFIELD, C. J.—I think there is no defence to this action. The defendants, as indorsee of the bill of lading, stand in the same situation as the consignees; the property was in them. I see no difference between the indorsee of a bill of lading and the consignee—there is no difference at all. The party who takes the goods under a bill of lading, by which they are made deliverable on payment of freight, must pay the freight accordingly. It does not signify that the proceeds were paid over before a demand of the freight was made. The defendants became owners of the goods by the indorsement of the bill of lading; they

they took the goods as indorsee of the bill of lading. I care not whether in general they are brokers or not. In this instance they were legal owners of the goods at the time of the landing, the bill of lading having been indorsed to them for a valuable consideration; they were not mere agents, the property was vested in them; if they have not reserved the freight from the amount of the proceeds, it is their own fault. They had notice by the bill of lading that the freight was to be paid by the persons who received the goods; they were therefore bound to see to the payment of the freight, and are still liable for it. This is wholly unlike a claim for freight on the subsequent purchaser of the goods. He received them long after they were landed by an order from the defendants, in which freight was not mentioned. The defendants received them when landed under the bill of lading, signed by the master of the ship, by which they were deliverable to the shipper or his assigns, on payment of freight as per charter party, with primage and average accustomed.

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The plaintiffs had a verdict for £911. the rate of freight specified in the charter party.

A rule to shew cause why there should not be a new trial was granted in Hilary Term, but discharged in Easter Term; Gibbs, C. J. and the rest of the Court being of opinion that the case came within the authority of *Cock v. Taylor (a)*.

Lens,

(a) But in *Moorfom v. Kymer*, H. T. 1814, the Court of K. B held, that where there is a charter party under seal, providing for payment of freight by the freighter, and the goods

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 tiffs.
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 and Another
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 and Others. *Shepherd, Serjt. S. G. and Puller* for the defend-
 ants.

[Attornies, *Kaye* and *Crowder*]

are received under an indorsed
 bill of lading, by which they are
 deliverable to the freighter or
 his assigns, he or they paying
 freight as per charter party,

there is no implied promise on
 the part of the indorsee of the
 bill of lading to pay freight to
 the owner of the ship.

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ABANDONMENT.

See INSURANCE, 30.

ACCESSIONARY.

See INDICTMENT, 5, 7.

ACTION.

See AVERAGE GENERAL.

1. An action on the case may be maintained against a judge of the ecclesiastical court who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order. *Beaurain v. Sir Wm. Scott*, 388
2. An action on the case may be maintained against an incorporated waterworks Company, where workmen employed by persons who contract with the Company to lay down pipes for conducting water through a public street do the work in a negligent manner, whereby an individual passing along the street receives an injury. *Matthews v. West London Waterworks Company*, 403

- 3 A person who ships goods in an English port, as the agent of the owner of the goods resident abroad, and pays the freight for them, may maintain an action in his own name for not delivering them according to the bill of lading. *Joseph v. Knox*, 320

4. In an action against an attorney for goods sold, the plaintiff proved that he filed his bill at half past eleven in the forenoon of 24th Dec. and the defendant gave in evidence a receipt for the sum demanded, dated the same day.—*Held*, that this was no answer to the action, without proof that the payment was made before the filing of the bill. *Godard v. Benjamin*, 331

5. It is universally the duty of the occupier of a house having an area fronting a public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the

the area was in the same open state as when the accident happened. *Coupland v. Hardingham*, 398

AGENT.

See ACTION, 3. AUCTIONEER. BILLS OF EXCHANGE, 20. SALE, 8.

AGREEMENT.

See INTOXICATION.

A man being embarrassed in his circumstances, all his creditors sign an agreement to give him time for the payment of their respective demands by instalments, and to take his promissory notes for the amount.—This agreement is binding upon each of them, the signing of the others being a sufficient consideration, and they cannot sue for their original cause of action, without proving that the agreement has been broken on the part of the debtor. *Boothbey v. Sowden*, 175

ALIEN ENEMY.

1. In an action on a policy of insurance it is no defence under the general issue, that the persons interested, who were neutrals when the policy was effected and the loss happened, had become alien enemies before action brought. *Harman v. Kingston*, 152
2. Where to a plea of alien enemy the plaintiff replied that she was resident in this kingdom by the licence and permission of our lord the king,—*held*, that it was not enough to prove that a licence was granted to her under 38 Geo. 3. c. 77. which expired with that statute; and that she has since continued to reside openly in this country without molestation. *Alcitor v. Smith*, 245
3. To prove that a person was an alien enemy at the time of action brought, it is not enough to shew that he was

some time before domiciled in a territory which has become hostile, without shewing that he was a native of that territory. *Harman v. Kingston*, 153

AMBASSADOR.

See SHERIFF, 9.

ANNUITY.

See ATTORNEY. EJECTMENT, 5. EVIDENCE, 9.

APPRENTICESHIP.

1. An indenture of apprenticeship is not void by 8 Ann. c. 9. although it was originally agreed between the master and apprentice's father, that a premium of 20l. should be paid, and the master afterwards, to reduce the amount of the duty, agrees to take 19l. 19s. 6d. which is the sum inserted in the indenture, and actually paid. *Shepherd v. Hall*, 180
2. In an action on 5 Eliz. c. 4. for setting on work one who has not served an apprenticeship of seven years, the defendant is not liable, unless he knew that the person set on work had not served an apprenticeship; but the Jury may infer that he knew this from his having had the means of knowledge. *Holden q. t. v. Lawrie* 188
3. An action on 5 Eliz. c. 4. § 31. for setting to work a person who has not served an apprenticeship, cannot be maintained, unless the unqualified person has worked by the defendant's orders one entire month in the county in which the venue is laid.—Nor is it enough that the defendant gave him orders in this county to work, and that he accordingly did work, at the business above a month in another county. *Cunningham q. t. v. Watson*, 249
4. An indictment cannot be maintained on 5 Eliz. c. 4. for exercising a trade without having served an apprenticeship,

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ship, unless the defendant is proved to have exercised the trade for the space of a month. *Rees v. Barnett*,

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5. It is an offence against 5 Eliz. c. 4. § 31. to employ an unqualified person in any substantive part of a trade within the statute, although he is incapable of doing the more difficult parts of the business, and never finishes any one article. *Pratt q. t. v. Frazer*,

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6. If a particular trade was carried on in 5 Eliz. it is within the provisions of the above statute, although the mode of carrying it on has been materially altered. *Pratt q. t. v. Frazer*,

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7. A person merely employed as *out door man* to nail on horses-shoes made by others, is not set on work in the trade of a *farrier* within the meaning of 5 Eliz. c. 4. *Hudson v. Field*,

15 n.

8. A trade is not within 5 Eliz. c. 4. although several of its intermediate operations were known and practised in England when the act passed, if its ultimate object be a machine or manufacture subsequently introduced or invented. *Martins v. Galloway*, 121

9. In an action on 5 Eliz. c. 4. for setting to work in a trade a person who had not served an apprenticeship, if the trade is not enumerated in the statute, some evidence must be given that it was known and practised in England when the act passed. *Martins q. t. v. Galloway*,

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10. Q. as to proper title of stat. 5 Eliz. c. 4. which is stated differently in different editions of the statutes? Where it was set out in an indictment as given by Ruffhead, the judge refused to direct an acquittal for a variance, on production of a copy of the act printed by the King's printer, in which it is given differently. *Rees v. Barnett*,

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AREA.

See ACTION, 5.

ARREST, MALICIOUS

A. by mistake sues out a bailable writ against *B.*, and gives it to *C.*, a *sergeant*, to be executed.—*C.* says to *B.* he has a writ against him, but *B.* denying that he owed the money, *C.* does not take him into actual custody. On inquiry, the mistake is discovered, and *B.* is told he need give himself no farther trouble in the matter. However, he afterwards puts in bail above, and incurs an expence of 14l.—*Held*, that, he could not maintain an action against *A.* for a malicious arrest. *Bisshopp v. Burridge*,

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ARTICLES.

See SEAMEN'S WAGES, 2.

ASSIGNEE OF BANKRUPT.

See ASSIGNEE OF LEASE, 2. AUCTIONEER, 2. BANKRUPT.

ASSIGNEE OF LEASE.

1. *A.* being assignee of a lease, puts it up to auction: *B.* becomes the purchaser, pays a deposit, and orders an assignment to him to be prepared by *A.*'s solicitor;—which is accordingly prepared and executed by *A.*, but instead of being delivered to *B.*, it remains in the possession of the solicitor, who claims a lien for the expence of preparing it. *Held*, that an action against *A.* as assignee of the term for rent accruing due after he had executed the assignment, these facts were sufficient to support a plea, that before the rent became due, he had assigned to *B.* *Odell v. Wake*,

2. The assignee of a bankrupt having allowed his effects to remain upon the premises,

O o

premises occupied by him nearly a twelvemonth after the bankruptcy, for the purpose of preventing a distress, paid the arrears of rent due, at the same time intimating to the landlord that they did not mean to take the lease, unless it could be advantageously disposed of: the effects were soon after sold and removed from the premises: the lease was at the same time put up to sale by order of the assignees; but there were no bidders for it: they omitted to return the key to the landlord for near four months afterwards; however, they were not asked for it, and they no otherwise made use of the premises.—*Held*, that they were not, under these circumstances, liable to the landlord as assignees of the lease. *Wheeler v. Bramah*, 340

ASSUMPSIT INDEBITATUS.

See MONEY HAD AND RECEIVED.

1. Under a general count is indebitatus assumpsit for *work, labour, and materials*, the plaintiff may recover for attendances as a farrier and for medicines administered in the cure of the defendant's horses. *Clark v. Mumford*, 37
2. Where goods were sold "to be paid for by E.'s bill on P. without recourse on the buyer in case of its not being paid," although the buyer then knew the bill to be worth nothing, he is not liable to an action of indebitatus assumpsit for the value of the goods. *Rand v. Hutchinson*, 352

ATTESTING WITNESS.

See WITNESS, 6.

1. A person who sees an instrument executed, but is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove

it as an attesting witness. *McCraw v. Gentry*, 232

2. Where an attesting witness becomes insane, the instrument may be proved by evidence of his hand-writing: *Cutrie v. Child*, 283

*ATTORNEY.

See ACTION, 4. BANKRUPT, 1. EVIDENCE, 9.

An attorney employed to purchase and prepare the assignment of an annuity before the decisions holding that the trusts in the annuity deeds must be particularly set forth in the memorial, is not liable for negligence in not having pointed out to his employer that the annuity purchased was void, because the memorial omitted particularly to specify the trusts of the annuity deeds. *Baikie v. Chandlest*, 17

*AVERAGE GENERAL.

1. An action at law may be maintained to recover a contribution in the nature of general average by one shipper of goods against another. *Dobson v. Wilson*, 480
2. Where the master of a ship in a foreign port was arrested by process out of a court of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on her account, and the master not being able to raise money by any other means, that he might procure his liberation, and pursue the voyage, sold a part of the cargo.—*Held*, that the owner of the goods so sold had no right to a contribution in the nature of general average from the shippers of the other goods on board, which arrived safely at the port of destination. *Dobson v. Wilson*, 480

AUCTIONEER.

See SALE, 7.

1. If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor. *Deneu v Daviell*, 451
2. A trader sends goods to an auctioneer to be sold, and then goes to prison, where he lies above two months. Within this time the auctioneer, not knowing of the trader being in prison, sells the goods, and accounts with him for the proceeds. At the end of two months a commission of bankrupt is sued out against the trader — *Held* that his assignees could not maintain trover for the goods against the auctioneer, and that the payment of the money to the trader under these circumstances was protected by 1 Jac. 1. c. 15. *Coles v. Robins*, 183

AWARD.

See HIGHWAY, 1. INTEREST, 1.

BAIL BOND.

See BOND, 2. WITNESS, 6.

BANKERS.

See BILLS OF EXCHANGE. CHEQUE.
USURY, 2.

1. A change of partners in a banking-house is sufficiently notified to the customers of the house, by a change in the printed cheques. *Barfoot v. Goodall*, 147
2. Where bankers discount a bill of exchange for a customer, giving him credit for the amount of the bill, and debiting him with the discount, the bill becomes the property of the bankers; and upon their bankruptcy, their assignees may maintain an action upon it, although there be no balance due to them from the customer. *Carstairs v. Batts*, 301

BANKRUPT.

See ASSIGNER OF LAKE, 2. AUCTIONEER, 2. INTEREST, 12.

1. An attorney cannot be made a bankrupt as a money scrivener, unless he has been in the habit of having money deposited with him for the purpose of laying it out on securities. *Adams v. Malkin*, 334
2. If a fisherman buys fish at sea from other boats for the purpose of making up his cargo, which he carries ashore and sells, he is a trader within the meaning of the bankrupt laws; and if such be the usual practice of a particular class of fishermen, one of them who is proved to have once done so, will be presumed to have continued to carry on his business in the same manner. *Heanny v. Birch*, 433
3. Where a trader departs from his dwelling-house on account of domestic dissensions, if he makes no arrangements for carrying on his business in his absence, and he foresees that as a necessary consequence, his establishment must be broken up, and his creditors must be delayed, which events accordingly happen; he thereby commits an act of bankruptcy. *Habroyd v. Whitehead*, 530
4. A trader who is denied by his own orders to a creditor in the habit of calling upon him to demand a debt when he is at dinner, does not commit an act of bankruptcy, if his intent be to avoid interruption at that hour, and not to delay the creditor, although the creditor be thereby delayed. *Smith v. Currie*, 349
5. Where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his own house without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them lost their house of business there, and were arrested, at the same time carrying their

books of account along with them.—

Held, that they both thereby committed an act of bankruptcy. *Spencer v. Billing*, 312

6. Notwithstanding the order of the Lord Chancellor that commissions of bankrupt shall be sued out against parties by their real names, if a commission issues against a man by a wrong name, under which he obtains his certificate;—while the commission remains unsuperseded, a plea of bankruptcy to an action brought against him by his right name, will be supported by production of the certificate, and proof that he is really the person against whom the commission issued. *Stevens v. Elruee*, 256

7. If a commission of bankrupt has passed the great seal, although it never be opened or acted upon, it has issued within the meaning of 49 Geo. 3. c. 121. s. 2. so as to be notice of a prior act of bankruptcy, and to deprive any party who has received payments from the bankrupt after an act of bankruptcy, and more than two months before the issuing forth of the effective commission, of the benefit of 46 Geo. 3. c. 135. s. 2. *Watkins v. Maund*, 308

8. The assignees under a joint commission against A. and B. in suing on a separate contract entered into with A. may describe themselves generally as the assignees of A. without noticing the name of B. *Stoughton v. De Silve*, 399

9. To render the proceedings under a commission of bankrupt evidence pursuant to Sir Samuel Romilly's act, it is enough to shew that they are produced from the custody of the solicitor to the commission, or to prove the hand-writing of one of the commissioners before whom they were taken. *Gallison v. Hillier*, 30

10. In an action of trespass brought by a bankrupt against his assignees to try

the validity of the commission, although they are not named as assignees on the record, if he does not give any notice under Sir S. Romilly's act, 49 Geo. 3. c. 121. s. 10. the commission and the proceedings under it are sufficient evidence to prove the trading, act of bankruptcy, and petitioning creditor's debt. *Simmonds v. Knight*, 251

11. In an action by a bankrupt against his assignee to try the validity of the commission, if there be no notice under Sir S. Romilly's act, the proceedings are only *prima facie* evidence for the defendant, and the plaintiff may call witnesses to contradict the depositions respecting the trading, petitioning creditor's debt, or act of bankruptcy. *Ellis v. Shirley*, 424

12. To prove the allowance of a bankrupt's certificate by the Lord Chancellor, the book kept in the office of the secretary of bankrupts, in which entries are made of the allowance of certificates, is not secondary evidence. *Henry v. Leigh*, 499

13. To prove that the defendant who pleads his bankruptcy had been before discharged as a bankrupt,—after notice to produce the former certificate; it is enough if witnesses state they were employed by him to solicit that certificate, and that looking at the entries in their books they have no doubt it was allowed by the Lord Chancellor. *Henry v. Leigh*, 499

14. Where two partners have stopped payment, and a commission of bankrupt is taken out against one of them, a debtor to the firm who knows of the stoppage cannot refuse to pay money due to them, on the ground that the other may have committed an act of bankruptcy, in which case his assignees might call upon the debtor to pay a moiety of the money a second time. *Prickett v. Deane*, 231

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15. In an action for maliciously suing out a commission of bankrupt to sustain an allegation, that the commission was duly superfeded, it is not enough to prove an order by the Lord Chancellor directing it to be superfeded. *Poynton v. Forster*, 60

16. Stat. 19 Geo. 2. c. 32. only protects payments in respect of bills of exchange after a secret act of bankruptcy, where the bankrupt was liable on the bills to the party receiving the money. *Holroyd v. Whitehead*, 530

BARON AND FEME.

See COVERTURE.

1. If wearing-apparel is supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which the credit is given to her, and her promissory note is taken in payment, the husband is not liable for any part of the goods, and in an action against him for their value, is not bound to prove that his wife was supplied with suitable wearing apparel from any other quarter. *Metcalf v. Shaw*, 22.
2. Under a plea of the general issue to an action of assumpsit against husband and wife for goods sold to the wife before the marriage, it is competent to prove that she was then married to another husband who is still alive. *Cowley v. Robertson*, 438
3. If a husband turns his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose. *Shepherd v. Mackoul*, 326
4. Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence;—*held*, that he was liable to an attorney whom he employed to defend her, and by whom he knew that she was defended. *Shepherd v. Mackoul*, 326

BASTARD.

1. A woman tried on the conspiracy, in quest for the murder of her bastard child, may be found guilty under 43 G. 3. c. 58. l. 4. of endeavouring to conceal the birth. *Ross v. Cole*, 11

BILL OF LADING.

1. By a bill of lading, goods are deliverable to J. S. if he should accept and pay a bill of exchange;—if not, to the holder of the said bill of exchange. —J. S. accepts the bill of exchange, and indorses the bill of lading for a valuable consideration; but does not pay the bill of exchange when due. —*Held*, that upon its dishonour, the property of the goods vested in the holder of it, and that he might maintain trover for the goods against the indorsee of the bill of lading. *Barrow v. Coles*, 92
2. Merchants in London receive from a mere stranger residing abroad a bill of lading of certain goods in a letter requesting them to effect insurance. They declining to do business for the consignor, but acting bona fide with a view to his interest, indorse the bill of lading to a friend of his, who receives the goods, and afterwards fails with the proceeds in his hands. —*Held*, that the merchants by indorsing the bill of lading were liable to the consignor for the amount. *Cornish v. Gordon*, 478

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BANKERS, 2. INTEREST, 4. 5. USURY, 2.

1. Where the drawer of a bill of exchange makes it payable at a particular place, this is part of the contract, and must be mentioned in indorsing the bill in the declaration. *Hedge*, 11

2. Where a bill of exchange is drawn payable in London, and it is accepted payable at a London banker's, in an action against the acceptor, a presentment for payment there is a material circumstance, and must be proved at the trial. *Hodge v. Fillis*, 463
3. If a promissory note is made payable at a particular place, it is a fatal variance to omit to state this in declaring on the note. *Rache v. Campbell*, 247
4. An action may be maintained here by a neutral on promissory notes given to him by a British subject in an enemy's country for goods sold there. *Houriet v. Morris*, 303
5. Where the drawee of a bill of exchange who had once refused to accept it, said to the holder, "if you will send it to the counting-house again, I will give directions for its being accepted."—Held that he was not liable as acceptor, without evidence that the bill was again sent back to his counting-house for acceptance. *Anderson v. Hick*, 179
6. Although a bill of exchange cannot be re-issued after it has arrived at maturity and been once paid, yet if it is paid and afterwards indorsed before it becomes due, it is a valid security in the hands of a bona fide indorsee. *Burbridge v. Manners*, 194
7. Notice of the dishonour of a bill of exchange or promissory note, may be given the same day it becomes due, as soon as the acceptor or maker has refused payment. *Burbridge v. Manners*, 193
8. Where a bill is drawn upon funds which there is reasonable ground to expect will reach the hands of the drawee before it becomes due; although they do not, the drawer is entitled to notice of its dishonour. *Robins v. Gilson*, 334
9. If the drawer of a bill of exchange has reasonable ground to expect that it will be honored on the strength of a consignment, he is entitled to notice of its dishonour, although no effects ever get into the hands of the drawee to pay it. *Rucker v. Hiller*, 217
10. The drawer of a bill of exchange is entitled to due notice of its dishonour if he had any effects in the hands of the drawee at any time between the drawing of the bill and its becoming due. *Hammond v. Dufrene*, 145
11. The drawer of two bills of exchange, before they became due received notice that they were accidentally destroyed, and was called upon to give others in their stead, according to the statute 9 & 10 W. 3. c. 17.—When the bills were drawn, he had no effects in the hands of the acceptors; but before either was due, the acceptors were indebted to him to an amount less than one of the bills, and became bankrupt. Held, that he was nevertheless entitled to notice of the dishonour of both bills. *Thackray v. Blackett*, 164
12. A few days before a bill of exchange becomes due, the acceptor informs the drawer, he will be unable to pay it, says the drawer must take it up, and gives him part of the amount to assist him in doing so: The drawer receives the money, and promises to take up the bill accordingly.—Held, that in an action by the indorsee against the drawer, the latter might nevertheless set up as a defence, that the bill was not duly presented for payment, and that he had not regular notice of its dishonour; but that the sum paid him by the acceptor, was money had and received to the plaintiff's use. *Baker v. Birch*, 207
13. Where the drawer of a foreign bill of exchange happens to be in England when it becomes due and is dishonoured, it is enough for the purpose of charging him, to have the bill

- bill protested, and to give him notice of the fact of its dishonour, without communicating the protest to him, or sending a copy of it to the place where the bill was drawn. *Robins v. Gibson*, 334
14. To excuse the not giving of regular notice of the dishonour of a bill of exchange to the indorser, it is not enough to shew that the holder, being ignorant of his residence, made inquiries upon the subject at the place where the bill is payable. *Beveridge v. Burgis*, 262
15. In an action against the maker of a promissory note payable at a banking-house, it is not necessary to prove that he had notice of its dishonour. *Pearse v. Pemberthy*, 261
16. The drawer of an accommodation bill is not discharged by time being given to the acceptor. *Collett v. Haigh*, 281
17. Where, upon an accommodation bill becoming due, it was presented for payment to the acceptor, and he promised to pay it;—*held*, that he was not discharged by time being afterwards given, without his consent, to the drawer by the indorsee, who knew that it had been accepted for the drawer's accommodation. *Kerrison v. Cooke*, 362
18. Where several plaintiffs sue as indorsees of a bill of exchange, if the bill appears indorsed in blank there is no necessity for their proving that they were in partnership together, or that the bill was indorsed and delivered to them jointly. *Ord v. Portal*, 239
19. In an action on a promissory note or bill of exchange, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed, and payment should not be demanded when it became due. *Hoare v. Graham*, 57
20. The maker of a promissory note pays money into the hands of an agent to retire it; the agent tenders the money to the holder of the note, on condition of having it delivered up: the note being delivered, this condition is not complied with; and the agent afterwards becomes bankrupt with the money in his hands. *Held*, that the maker was still responsible on the note; but that interest was not recoverable after the time of the tender. *Dent v. Dunn*, 296
21. A traveller received a bank note in a provincial town, which he cut in two, and sent the halves on different days by the post, addressed to his employers in London; one of the halves was stolen from the mail coach, and they received the other.—*Held*, that under these circumstances, they could not maintain an action against the makers of the note on producing that half which reached them safely. *Mayor v. Johnson*, 324
22. A bill of exchange payable to the order of the drawer, in an action by him against the acceptor, is good evidence under the money counts. *Thompson v. Morgan*, 301
23. Where under an agreement between A and B. for the sale of a lease, B. accepts a bill for the purchase money, and is let into possession of the premises, it is no defence to an action by A. against B. upon the bill, that A. refused to execute an assignment of the lease according to the agreement. *Moggridge v. Jones*, 33
24. Although a promissory note without a stamp cannot be received in evidence as a security, or to prove the loan of money, it may be looked at by the jury with a view to ascertain a collateral fact. *Gregory v. ...*
25. A bill of exchange accepted by an officer in the recruiting service, for payment of small quantities of ...

I N D E X.

under the value of 20s. supplied by a publican to be used out of his house by persons and others under the command of the acceptor, is valid, notwithstanding 24 G. 2. c. 40. s. 12.

Cooper v. Smith,

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See Scot v. Gilmore, 3 Taunt. 226

BOND.

1. Where to debt, on bond, conditioned for the payment of a sum of money on demand, the defendant pleads that no demand was made, upon which issue is joined, the plaintiff must prove an express demand before action brought.

Carter v. Ring,

459

2. If a party executes a bail bond before the condition is filled up, it is void.

Powell v. Duff,

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BOOKS OF ACCOUNT.

See EVIDENCE, 13.

BROKER.

See INSURANCE BROKER.

Where colonial produce is sold, through the intervention of a broker; by the usage of trade in London, (which was held to be valid,) he is entitled in all instances (if there be no express stipulation to the contrary) to $\frac{1}{2}$ per cent. commission from the purchaser, as well as from the seller.

Eiche v. Meyer,

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BUST.

1. It is no offence under 38 G. 3. c. 71. passed for preventing the pirating of busts and other figures made and published by Statutes, to sell a pirated cast of a bust, if the piracy has any addition to or diminution from the original; and it appears to be no offence to make a pirated cast, if it is a perfect fac-simile of the original.

Gabagan v. Cooper,

111

2. If a person who is not a modeller

or statuary *exposes to sale a pirated bust*, this is not presumptive evidence of his having made it. *Gabagan v. Cooper,* 115

CARRIER.

1. A notice by carriers that they will not be answerable for any goods above the value of 5l. unless the value be declared, and a premium paid above the common carriage, does not apply to goods which, from their bulk and appearance, must be known to exceed the specified value. *Beck v. Evans,* 267

2. If a carrier receives goods at a distance from his office,—to be discharged from his common law liability, he must prove that the special terms on which he deals were communicated to the owner of the goods through some other medium than a notice stuck up in the office; and that to be of any avail must be in such large characters that a person delivering goods at the office cannot fail to read it without gross negligence.

Clayton v. Hunt,

27

3. Notwithstanding a notice by carriers that they will not be accountable for goods of a particular description, above the value of 5l. "unless specified and paid for as such when delivered;"—held that they were liable for damage done to an article of this description, much above the value of 5l. although not paid for as such when delivered, their book-keeper having been then informed of its value, and desired to charge for it what he pleased, which should be paid, provided it was taken care of. *Wilson v. Freeman,* 527

CASE.

See ACTION. PLEADING, &c.

CERTI-

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CERTIFICATE OF BANKRUPT.

See BANKRUPT, 6, 12, 13.

CERTIFICATE FOR COSTS.

See FALSE IMPRISONMENT, 3. "PRACTICE, 4.

CHARTER-PARTY.

See SHIP, 3, 5, 6, 10, 14.

CHEQUE.

See INDICTMENT, 1.

If a cheque is given on a verbal condition, which the drawer finds is to be broken or eluded, he has a right to stop the payment of the cheque.
Wienholt v. Spitta, 376

COMPOSITION.

See AGREEMENT.

CONSTABLE.

A member of the Barbers Company in the City of London, is not exempted from serving the office of constable.
Ren v. Chapple, 91

CONVEYANCE.

Where a statute points out the particular manner in which a canal company shall sell and convey lands, and enacts that every such sale and conveyance shall be valid and effectual to all intents and purposes, this does not cure any defect in the title to lands so sold and conveyed by the company. *Ward v. Scott,* 284

CONVOY ACT.

See INSURANCE, 18, 29.

CORPORATION.

See ACTION, 2.

COVENANT.

See SHIP, 3, 6.

1. A covenant in the lease of a house, "to insure and keep insured a given sum of money upon the premises during the term in some sufficient Insurance Office," is not void for uncertainty; but means, that the premises shall be insured against fire in some office where insurances against fire are usually effected. *Doe d. Piss v. Shewin,* 154
2. Where there was such covenant in a lease on the part of the tenant, he effected an annual policy on the premises with an Insurance Company in the usual printed form, by which it is declared that the policy shall be for such longer period as the tenant shall regularly pay, and the Company receive the premium, and a space of 15 days beyond the quarter day is given for payment of the premium, during which time the Company is liable: The year expired on the 25th of March 1811; but the tenant did not pay the premium for a renewal till the 25th of April following: The Company then gave a receipt for the premium, stating the insurance to be from Lady-day 1811 to Lady-day 1812.—*Held,* that the covenant was broken by reason of the non-payment of the premium on or before the 25th of April, and that the lease was forfeited upon a clause of re-entry. 18.

COVERTURE.

See BARON AND FEME.

1. To support a defence to an action of assumpsit, that the plaintiff was under coverture when the cause of action accrued, although she lived as a single woman,—it is not enough to produce bare declaration by her that she has been married to J. S. who was alive, without actual proof of the marriage, or of cohabitation with her husband.

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supposed husband; particularly if there appears any reason to doubt that the marriage was valid. *Wilson v. Mitchell*, 593

2. A woman by birth an alien, and the wife of an alien, cannot be sued as a feme sole, if her husband has lived with her in this country, although he has left her here and entered into the service of a foreign state. *Key v. Ducheffe de Pienne*, 123

CROSS ACTION.

See MONEY HAD AND RECEIVED, 1.

DISTRESS.

- If the occupier of a house submits to a distress for rent stated in the notice of distress to be due from him as tenant to the distrainer, this is an acknowledgment of the tenancy. *Panton v. Jones*, 372

DOUBLE VALUE.

See NOTICE TO QUIT, 2.

ECCLIESIASTICAL COURT.

See ACTION, 1. EVIDENCE, 15.

EJECTMENT.

See WITNESS, 3.

1. In ejectment, where the defendant comes in as landlord, it is necessary to shew that he is in the receipt of the rents and profits of the premises to which the lessor of the plaintiff makes title, or that the declaration in ejectment was served upon the tenant in possession of these premises. *Fenn d. Phillips v. Cook*, 512
2. In ejectment, where the defendant comes in as landlord, to connect him with the premises to which the lessor of the plaintiff makes title, it is enough to shew that the declaration in ejectment was served upon the

tenant in possession of these premises. *Doe v. Schofield v. Alexander*, 516

3. In ejectment on the several demises of three persons, each demise being of the whole, the lessors of the plaintiff are entitled to a verdict, upon evidence that they jointly granted a lease to the defendant which has expired: *Doe d. Lulham v. Fenn*, 190
4. In ejectment by an executor, it is sufficient prima facie evidence that the testator had a chattel interest in the premises, to put in the defendant's answer to a bill in equity stating that "he believed the testator was possessed of the leasehold premises in the bill mentioned." *Doe d. Digby v. Steel*, 115
5. In ejectment upon the assignment of a term to secure an annuity, a proper memorial of the annuity deeds will be presumed till the contrary is shewn. *Doe d. Griffin v. Mason*. 7

ESCAPE.

See SHERIFF, 5.

EVIDENCE.

See BANKRUPT, 9, 10, 11, 12, 13, 15.
INSOLVENT DEBTORS ACT, 1.

1. Copy of sentence of condemnation, not evidence, though handed over by assured to underwriters. *Flindt v. Atkins*, 215, n.
2. Where to an action against executors on the bond, of their testator, they plead *non est factum*, and set up lunacy as a defence at the trial, an inquisition taken under a commission of lunacy against the testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence. *Faulder v. Silk*, 126.
3. On a trial at law, an examined copy of the plaintiff's answer to a bill in equity may be read in evidence against him,

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him, without producing the original.
Hodgkinson v. Wilkes, 401

4. In an action for disturbing plaintiff's enjoyment of a pew claimed in right of a messuage, an old entry in the book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage (under whom the plaintiff claims), in consideration of his using it, is admissible evidence to prove plaintiff's right to the pew. *Price v. Littlewood*, 288.

5. In an action by the master of a ship for freight, the declarations of the owner for whose benefit the action is brought, are evidence for the defendant. *Smith v. Lyon*, 465

6. Where the defendants had acknowledged they had received a letter of a particular date from the plaintiff, which upon notice they did not produce at the trial;—*held*, that an entry by a deceased clerk of the plaintiff in a letter book, professing to be a letter of the same date from the plaintiff to the defendants, was admissible evidence of the contents of the letter, on proof that according to the plaintiff's course of business the letters which he wrote were copied by this clerk, and then sent off by the post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found correct. *Pritt v. Fairclough*, 305

7. Entry of the deceased clerk of a merchant in the letter book, received in evidence; on proof that it was made in the usual course of business in the merchant's counting-house, *Hagedorn v. Reid*, 379

8. If there be one invariable mode in which bills of exchange are drawn between particular parties, this may be proved by parol evidence, without any of the bills being produced. *Singer v. Billing*, 310

9. In an action against an attorney for

negligence in respect to the memorial of an annuity which he had prepared and carried in to be enrolled, an examined copy of the roll is prima facie evidence of the contents of the memorial. *Baillie v. Chandless*, 20

10. To render the certified copy of the affidavit made by the proprietor of a newspaper evidence under 38 & 39, c. 78. it must either appear upon the *jurat* that the person before whom it was made, had authority to take it, or this fact must be proved *alunde*. *Rex v. White*, 99

11. But it is sufficient evidence of publication at common law, to put in the original affidavit of the proprietor, stating where the paper was to be published, and to prove that a paper with a corresponding title containing the libel was purchased there. *Rex v. White*, 100

12. In an action on 14 Geo. 3. c. 49, by the treasurer of the College of Physicians, to prove his right to be in that capacity, it is enough to put in the annals of the Comitia Majora recording his appointment, and to shew that he afterwards acted as treasurer, without calling any one who was present at the election. *Budd v. Foulke*, 305

13. If upon a notice to produce bills of account, they are not produced, this circumstance affords no ground for any inference respecting their contents, and merely enables the opposite party to prove their contents by parol evidence. *Coker v. Gibbons*, 366

14. The duplicate of a writing taken from the autograph at one impression by means of a copying machine, not be read in evidence as an original. *North v. Murray*, 366

15. The practice of the ecclesiastical court is matter of fact to be proved by evidence, and left to the jury. *Beaurain v. Scott*, 366

EXECUTORS.

See EJECTMENT, 4. SHIP, 13.

If executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable, upon an implied promise, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. *Tugwell v. Heyman*, 298

FACTOR.

See BROKER.

Where a factor upon selling goods takes a security payable to himself from the purchaser, and gives his own security to the principal for the net proceeds, without disclosing the name of the purchaser; if the latter becomes insolvent before paying his security, the factor cannot compel the principal to refund the money received by him as the price of the goods. *Simpson v. Swan*, 291

FALSE IMPRISONMENT.

See TRESPASS.

1. The keeper of a prison who receives and detains one apprehended and charged in his custody under a warrant, runs the risk of the warrant having been executed against the proper person; and though acting *bona fide*, and without the means of ascertaining the identity of the individual named in the warrant, he is liable to an action of trespass and false imprisonment, if by the mistake of the officer to whom it was directed, it was executed against another. *Aaron v. Alexander*, 35
2. A peace officer may justify taking a person into custody charged with a felony, although no felony was committed. The same rule stated to have been laid down by BULLER, J. with

respect to a breach of the peace. *Hobbs v. Branscomb*, 420

3. In trespass and false imprisonment against several, where one acquitted, certificate granted under 8 & 9 W. 3. c. 11. to deprive him of his costs. *Aaron v. Alexander*, 35

FALSE RETURN.

See SHERIFF, 4, 6, 8.

FIRE INSURANCE AGAINST

See COVENANT, 1, 2. INSURANCE, 32.

FRAUDS, STATUTE OF.

If goods are ordered verbally, the delivery of them to a carrier is sufficient to bind the contract according to the statute of frauds, where the purchaser has been in the habit of receiving goods from the vendor by the same mode of conveyance. *Hart v. Sattley*, 528

FREIGHT.

See SHIP.

GAME.

Although it may be a defence to an action for penalties on 5 Ann. c. 14. that the defendant joined in the sport as servant to another, he must give strict evidence that the person by whose orders he acted was himself qualified to kill game. *Clarke v. Broughton*, 328

GUARANTIE.

1. If *A.* become bound to *B.* under condition that *C.* shall truly account to *B.* for all sums of money received by *C.* for *B.*'s use, and *C.* afterwards, with *B.*'s knowledge, takes *D.* as his partner; the guarantie does not extend to sums of money received by *C.* for *B.*'s use, after the formation of the

the partnership. *Bellairs v. Elsworth*, 53

2. An undertaking to be answerable to a given amount for any goods supplied by A. to B., after goods to that amount have been supplied and paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. But as soon as A. alters the credit on which he supplied the goods to B. the surety is discharged. *Bastow v. Bennett*, 220

3. In an action on a guarantie for the debt of a third person, signed by one of two partners in the partnership firm, it is necessary to give some evidence beyond the relationship of partners subsisting between them, that the one who signed had authority to bind the other by the guarantie. But for this purpose it would be sufficient to prove a parol acknowledgement from the other partner subsequently to the giving of the guarantie, or to shew a previous course of dealing, in which similar guaranties had been given in the partnership firm, with the privity of both partners. *Duncan v. Lowndes*, 478

HIGHWAY.

See PLEADING, 4.

1. Upon the trial of an indictment for not repairing a highway, which it is alleged the defendant is bound to repair *ratione tenure*, an award made under a submission by a former tenant for years of the premises can neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*. *Ren v. Cotton*, 444
2. Although a statute enacts, that the paving of a particular street shall be under the care of commissioners, and provides a fund to be applied to that

purpose, and another statute passed for paving the streets of the parish, contains a clause that it shall not extend to a particular street, the inhabitants of the parish are not exempted from their common law liability to keep that street in repair. *Ren v. Inhabitants of St. George Hanover Square*, 222

HORSE.

1. In an action for not taking proper care of a hired horse, whereby his knees were broken, the plaintiff must give some positive evidence of negligence; and it is not enough to prove that the animal was returned by the defendant with his knees broken, although he had often been let out to hire before without having fallen down. *Cooper v. Barton*, 5
2. If upon a hired horse being taken ill, the hirer calls in a farrier, he is not answerable for any mistakes which the latter may commit in the treatment of the horse: but if instead of that he prescribes for the horse himself, and from unskilfulness gives him a medicine which causes his death, although acting *bonâ fide*, he is liable to the owner of the horse as for gross negligence. *Dean v. Keate*, 4

INDEBITATUS ASSUMPSIT.

• See ASSUMPSIT INDEBITATUS.

INDICTMENT.

See APPRENTICE, 4.

1. It is an indictable offence, fraudulently to obtain goods, by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid. *Ren v. Jackson*, 374
2. It is an indictable offence for stage coaches to stand plying for passengers in the public streets. *Ren v. Gough*, 374

3. It is an indictable offence for a timber merchant to cut logs of timber in the street adjoining his timber yard; though he would not be able otherwise to get them into his premises, or to carry on his business there. *Rex v. Jones*, 230
4. It is not an offence within the clause of Lord Ellenborough's act, 43 G. 3. c. 58., against maliciously luring, with intent to resist lawful apprehension, if the cutting took place in an attempt to apprehend the prisoner previous to any notification being made to him of the purpose for which he was laid hold of. *Rex v. Ricketts*, 68
5. To support an averment in an indictment for receiving stolen goods, that the principal felon had been duly convicted, it is sufficient to give in evidence the examined copy of a record shewing that he was found guilty of the felony before a court of competent jurisdiction, however informal the proceedings may appear, and however erroneous the judgment on the felon. *Rex v. Baldwin*, 265
6. If during the trial of a prisoner for a capital offence, one of the jurymen is taken ill, the jury may be discharged and the prisoner tried by another jury. *Rex v. Edwards*, 207
7. An indictment against an accessory to a felony, stating that the felony was committed by a person to the jurors unknown, cannot be supported if the principal felon was a witness before the grand jury. *Rex v. Walker*, 264
8. Upon an indictment on 43 G. 3. c. 58. § 2. charging the prisoner with having administered to a woman the decoction of savin, with intent to procure abortion, it is not a material variance that the preparation of savin administered, is properly called an infusion, not a decoction. *Rex v. Phillips*, 73
[The name of this case has been omitted in the report by mistake.]
9. Upon an indictment on 43 G. 3. c. 58.

- § 2., charging that the prisoner administered to a woman with child but not quick with child, for the purpose of procuring abortion, a large quantity of a certain "mixture to the jurors unknown, then and there being a noxious and destructive thing," it is unnecessary to prove that the mixture was noxious or destructive, or even that the woman was actually with child. *Id.* 75
10. The words "quick with child," in the first section of 43 G. 3. c. 58. are to be understood in their popular sense, viz. when the woman has felt the child move within her. *Id.* 76
11. Q. Whether it be now necessary in an indictment for felony, to lay a parish within the county? *Id.* 77
12. On indictment against a bankrupt for perjury before the commissioners, what evidence necessary to support the commission. *Rex v. Punshon*, 96.

INFANCY.

If goods are delivered to a carrier by the vendor, addressed to the purchaser, while the latter is under the age of 21, but they do not reach him till he has attained that age, infancy is a good defence to an action brought against him for the price of the goods. *Griffin v. Langfield*, 254

INSOLVENT DEBTORS ACT.

1. To prove that the plaintiff was discharged under an insolvent act after the cause of action accrued and before action brought, it is not enough to give in evidence a parol acknowledgment by him; but the clerk of the peace should be called, and the order of sessions produced to shew the regularity of the discharge. *Scott v. Clare*, 236
2. In an action by the payee of a bill of exchange accepted by the defendant for a valuable consideration, evidence that the plaintiff had been discharged

as an insolvent debtor after the bill became due, and had given in a blank schedule, is not enough to shew that the bill had been satisfied. *Hart v. Newman*, 13

INSURANCE. •

See ALIEN ENEMY, I. INSURANCE BROKER. •

1. Expected profits may be insured by an open policy. *Eyre v. Glover*, 276
2. Insuring a ship by an *English name* does not amount to a warranty, or a representation, that she is an *English ship*. *Clapham v. Cologan*, 382.
3. A policy "at and from A. and B." is not vitiated by inserting, without the consent of the underwriters, the words, "both or either." *Clapham v. Cologan*, 382
4. Where there is a warranty in a policy of insurance against average, "unless general, or the ship be stranded," if during the voyage the ship is forced ashore by the wind, or is driven on a bank, and remains fast for any time, this is a sufficient stranding to do away the effect of the warranty, although the ship is not proved to have thereby received any material damage. *Harman v. Vaux*, 429
5. There is not an implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented. Therefore, where from an omission of the captain, the goods insured on a voyage from this country to a foreign port are not mentioned in the ship's manifest as required by 13 & 14 Car. 2. c. 11. and other statutes, but the loss is not occasioned by this defect;—the underwriters are liable. *Carruthers v. Gray*, 142
6. Where it is stipulated by a charter party, that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage. *Hobbs v. Hannam*, 93
7. Where there is a policy on goods as may be thereafter declared and valued, the declaration of interest, to be available, must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss: But the declaration of interest is not a condition precedent; and if none is made, the policy is then open instead of being valued, and upon proof of interest at the trial, the assured will be entitled to recover. *Harman v. Kingston*, 150
8. Where there is a policy on goods by ship or ships to be thereafter declared, if the broker by mistake makes a written declaration upon goods by a wrong ship, to which the underwriters put their initials; he may afterwards in compliance with the orders of the assured, declare upon goods by another ship, without the assent of the underwriters, and without a fresh stamp. *Robinson v. Touray*, 158
9. If goods are fraudulently overvalued in a policy of insurance with intent to cheat the underwriters, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board. *Haigh v. De la Cour*, 119
10. Where a licence is granted for a voyage to a hostile country, to continue in force till a given day, if the voyage is *bonâ fide* begun before that day, it continues to be protected by the licence though delayed beyond the day by stress of weather or other accident over which the assured have no controul. *Groning v. Crockett*, 83
11. So where there is a policy "at and from," if the ship has her cargo on board and is ready to sail before the day when the licence expires, although she is detained in port till after the day by contrary winds, the policy remains valid. *Schroder v. Faus*, 111

12. A licence to *A. B.* on behalf of himself and other British or neutral merchants, to transport a cargo in a vessel bearing any flag except the French, will legalize a policy of insurance on a ship belonging to an alien enemy employed for this purpose, if the cargo is proved to belong to British or neutral merchants; but not otherwise. *Hagedorn v. Reid*, 377
13. In effecting a policy of insurance from Russia to this country while the ship was on the outward voyage, the broker represented to the underwriters that a cargo was ready for her, and she was sure to be an early ship.—*Held*, that this amounted only to a representation of what was expected on the part of the assured, and that the underwriters were liable, although from the delay in beginning to load the cargo, the voyage home was turned from a summer to a winter risk. *Hulbard v. Glover*, 313
14. If a chartered ship be lost by means of the captain engaging in an illegal trade in obedience to the orders of the charterer, this is not a loss by barratry for which the owner of the ship can recover against the underwriters. *Holbs v. Hannam*, 94
15. If goods insured are warranted free from capture and seizure in the port of discharge, and the goods being destined to *Pillau* are seized while the ship is lying at anchor in *Pillau Roads*, this is a seizure in the port of discharge within the meaning of the warranty. *Maydew v. Scott*, 205
16. Where goods insured were warranted free from seizure in the port of discharge, the captain having arrived within about two miles and a half from the harbour of the place to which he was destined, cast anchor and made a signal for a pilot; a pilot boat in consequence came out with douaniers on board, who carried him into the harbour, where the cargo was seized and condemned.—*Held*, that this was a seizure in her port of discharge within the meaning of the warranty. *Oom v. Taylor*, 204
17. Upon a common policy on goods, the underwriters are discharged if the goods are landed at the port of destination by the officers of government there, and are lodged in the government warehouses, if this be the usual mode in which goods are landed at that port, although the goods insured are afterwards confiscated by the government, and are never in the possession of the consignees. *Brown v. Carstairs*, 161
18. Where a ship was insured from London to *Berbice*, with an extensive liberty of touching and trading at all places; held that by putting into *Madeira* and staying there after the convoy with which she failed had proceeded on the voyage, she was guilty of a deviation which discharged the underwriters.—*Semle*, that as the captain did not know when the convoy failed away and expected to overtake it, this was not a deserting of convoy within the meaning of the convoy act. *Williams v. Shee*, 469
19. A policy of insurance "at and from London to *Berbice*" was effected upon the receipt of a letter from the captain, (which was shewn to the underwriters,) stating that he had passed *Barbadoes*, and the words "at *it*" were inserted in the policy after the printed clause describing the beginning of the adventure on the goods. *Held*, notwithstanding, that the policy was vacated "by a deviation at *Madeira*, in a former part of the voyage. *Redman v. London*, 503
20. If a fire arises on board a ship from the damaged quality of goods on board which are insured, the underwriters are not liable; but if the loss is not occasioned by the damaged state of the goods on board, the policy

- licy is not vitiated by the fact not having been disclosed to the underwriters that the goods were damaged, though that might have a tendency to encrease the risk. *Boyd v. Dubois*, 133
21. Where a ship insured to Martinique and all or any of the windward and leeward islands, landed the greatest part of her cargo at Martinique, and sailed with the residue to Antigua, where she was wrecked while stopping partly to dispose of the residue of the outward cargo, and partly to obtain a homeward cargo :—*Held*, that the underwriters were not liable. *Inglis v. Vaux*, 437
22. Policy on goods "at and from the ship's loading port or ports in *Amelia Island* to London." The ship never touched at *Amelia Island*, but took in her cargo at *Tigre Island*, which lies a little farther up the river *St. Mary's*. *Held*, that the policy nevertheless attached, this being the usual mode in which ships in that trade take in their cargoes. *Moxon v. Atkins*, 200
23. Where there is a valued policy on freight, and the ship is lost while taking in her cargo, the assured can only recover for the freight of the goods actually on board, unless a full cargo be then provided for her, or there be a contract either written or parol to supply one. *Patrick v. Eames*, 441
24. To support an averment in a declaration on a policy of insurance on goods "that the ship with the goods on board when at A. was arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained, and confiscated," it is enough to shew that the goods were forcibly taken from on board the ship by the officers of government, and never delivered to the consignees ; —without putting in any sentence of condemnation. *Carruthers v. Gray*, 342
25. If a ship insured is condemned for carrying simulated papers, contrary to the law of nations, without having any liberty in the policy to do so, the underwriters are discharged. *Horney v. Luffington*, 85
26. Policy on goods "at and from Gottenburg to any port of the Baltic, beginning the adventure from the loading thereof," but declared to be in continuation of other specified policies. These were on the same goods "at and from Norfolk in Virginia," where in point of fact the goods were loaded.—*Held*, that under these circumstances, it was no defence to the underwriters on the first-mentioned policy, that the goods were not loaded at Gottenburg. *Bell v. Hobson*, 272
27. In an action on a policy of insurance on a voyage "to any port in the Baltic," evidence admitted to prove that the *Gulph of Finland* is considered in mercantile contracts as within the *Baltic*, although the two seas are treated as separate and distinct by geographers. *Shde v. Walters*, 16
28. Since the 10th of May 1806, the trading between this country and ports and places in the Island of *St. Domingo*, not under the dominion and in the actual possession of his Majesty's enemies, has been lawful without any licence. *Blackburn v. Thompson*, 61
29. To vacate a policy of insurance for an infraction of the convoy act, it is not enough to shew that the ship sailed without convoy by the instrumentality of an agent of the assured, unless it appear that the agent had authority from his principal for this purpose. *Carsairs v. Allan*, 307
30. Where goods were insured "at and from London to Quebec, warranted free of particular average," and the ship was driven back from the banks of Newfoundland, and obliged to put

into Kinfales, where it was impossible to repair, *her* so as to enable her to complete the voyage the same season, and the goods, which though not of a perishable nature, were to a certain degree damaged, could not be forwarded the same season by any other conveyance;—*held* that the assured could not by giving notice of abandonment come upon the underwriters for a total loss. *Anderfon v. Wallis*,

440

31. Where there is an insurance on ship and freight, and the ship has arrived in safety, and earned freight, the assured cannot afterwards claim a return of premium, on the ground that he had no insurable interest, on account of a defect in his title to the ship. *McCulloch v. Royal Exchange Assurance Company*,

406

32. If a person who is not a linen draper, insures his "stock in trade, household furniture, *linen*, wearing apparel, and plate," by a policy against fire, this will not protect linen-drapery goods subsequently purchased on speculation; and the word *linen* in the policy must be confined to household linen or linen used by way of apparel. *Watchorn v. Langford*,

422

INSURANCE BROKER.

1. The authority of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip, till such time as they have actually subscribed the policy; and if the broker having procured a slip to be written on terms within the scope of his original authority, receives an intimation from his principals that they will not submit to these terms, and afterwards effects the policy and pays the premiums to the underwriters, he can maintain no action against his principals for com-

mission or money paid. *Warwick v. Slade*,

127

As soon as an insurance broker has received credit in account with an underwriter for a loss upon a policy, his principal may maintain money had and received against him to recover the amount; and in such action, if the underwriter's name is erased from the policy, the defendant can neither dispute the liability of the underwriter for the loss, nor his own receipt of the sum subscribed. *Andrew v. Robinson*,

199

Insurance brokers holding a policy for the purpose of adjusting a loss, suffered an underwriter's name to be struck out, upon his signing the adjustment;—he gave them credit in his books for the loss, and became bankrupt; but they never took credit for the amount in their books;—on the contrary, they gave the assured notice of the bankruptcy, and there was afterwards a settlement of accounts between the brokers and the assured, comprehending the policy in question, in which no demand was made upon them in respect of the bankrupt's subscription.—Ruled, that they were not liable to the assured for the sum due from the bankrupt on the policy. *Ovington v. Bell*,

237

Insurance brokers are not liable to an action for neglecting to insert in a policy a liberty to carry simulated papers, if the written instructions given them contain no direction for that purpose, although it may have been verbally communicated to them that simulated papers were to be used in the voyage. *Famin v. Oswell*,

357

Where a ship was condemned for carrying simulated papers, and the policy containing no liberty to do so, the assured could not recover upon it:—*held*, that an action could not be maintained against the insurance brokers

kers for having neglected to include the premiums and duties, contrary to the instructions given them for effecting the policy ; as in the result the assured were not damaged, by this neglect. *Fomin v. Oswell*, 357

INTEREST.

See **BILLS OF EXCHANGE**, 20.

1. Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest afterwards. *Pinhorn v. Tuckington*, 468
2. An agent who has advanced money for his principal in effecting insurances and other mercantile business, is entitled to charge interest, and at the end of every year to make a rest, and add the interest then due to the principal. *Bruce v. Hunter*, 467
3. In an action to recover back a deposit paid on the purchase of an estate, the vendor not being able to make a good title, if the plaintiff declare specially, and allege as special damage that he has lost the use of his money ; on making out his case he will be entitled to interest on the deposit money from the time the purchase should have been completed. *De Bernales v. Wood*, 258
4. In an action against the drawer of a foreign bill of exchange dishonoured here for non-acceptance, where the plaintiff is allowed a *per-centage* in name of damages, he is only entitled to interest from the day when the bill ought to have been paid. *Gantt v. Mackenzie*, 51
5. Where there is no allowance for damages, the plaintiff is entitled to interest from the day the bill was dishonoured for non-acceptance. *Harrison v. Dickson*, 52 n.

INTOXICATION.

An agreement signed by a person in a state of complete intoxication is void. *Pitt v. Smith*, 33

JURY.

Where a private act of parliament provides for the expence of *maintaining* the jury summoned to assess the value of property taken under the act, this does not extend to a dinner at a tavern given to the jury after delivering in their verdict. *Forster v. Taylor*, 49

LANDLORD AND TENANT.

See **ASSIGNEE OF LEASE. DISTRESS. NOTICE TO QUIT. SHERIFF**, 3, 6, 7, 10.

LIBEL.

See **WITNESS**, 7.

1. An action may be maintained for defamatory words reduced into writing, which would not have been actionable if merely spoken. *Thorley v. Lord Kerry*, 214
2. A person who having a copy of a libellous caricature, shews it to another on being requested so to do, is not thereby liable to an action for maliciously publishing it. *Smith v. Wood*, 323

LICENCE.

See **INSURANCE**, 10, 11, 12.

1. To trespass for breaking and entering the plaintiff's house, and making a noise and disturbance therein, the defendant pleaded a licence, to which the plaintiff replied *de injuria*.—*Held*, that the plea was supported by evidence that the plaintiff kept a billiard table in the house, at which all persons were usually permitted by him to play at regulated prices, and that the defendant entered the house for the purpose of going to the billiard room, although while in the house he

was guilty of a trespass in assaulting the plaintiff. *Ditcham v. Bond*,

524

mission that he is liable to the action. *Hunter v. Britts*,

455

LIEN.

See SHIP, 4.

LIMITATIONS, STATUTE OF.

See MONEY HAD AND RECEIVED, 3.

In an action against *A.* on the joint and several promissory note of himself and *B.* to take the case out of the statute of limitations, it is enough to give in evidence a letter written by *A.* to *B.* within the six years, desiring him to settle the money. *Hilthead v. Ward*,

32

LUNACY.

See EVIDENCE, 2.

A person put in to superintend an unlicensed house for the reception of lunatics, is liable to the penalties of 14 Geo. 3. c. 49. without having any share in the profits of the establishment. *Budd v. Foulks*,

404

MALICIOUS ARREST.

See ARREST, MALICIOUS.

MARRIAGE.

See COVERTURE.

MESNE PROFITS.

Where premises are in the possession of a tenant, and there is judgement in ejectment against the casual ejector, in an action for mesne profits and costs of ejectment against the landlord, the judgement in ejectment is no evidence against him, without proof that he had notice of the ejectment, so that he might have come in to defend it; but a subsequent promise by him to pay the rent and costs amounts to an ad-

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MISNOMER.

See BANKRUPT, 6. *TRESPASS*.

If the plaintiff declares by a wrong christian name, this is no ground of nonsuit at the trial, if it can be shewn that the defendant knew that the action was brought by the person who actually sues. *Boughton v. Frere*,

29

MONEY HAD AND RECEIVED.

See BILLS OF EXCHANGE, 12, 22. *INSURANCE BROKER*, 2. *SHERIFF*, 1, 3.

1. Money had and received will not lie where the plaintiff upon the same transaction would be liable to a cross action to recover damages to an equal amount. *Simpson v. Swan*,
- 291
2. A receipt signed by an agent for his principals is not evidence to support an action for money had and received against him to recover the money back. *Edden v. Read*,
- 339
3. Where a sum of money has been lodged with a party to indemnify him against bills of exchange he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, altho' the statute of limitations has run upon them. *Morse v. Williams*,
- 418
4. Where a servant is in the habit of receiving sums of money for the use of his master, and by the established course of dealing, the servant pays these over to the master from time to time, without any written vouchers passing between them, the presumption of law is, that all sums so received by the servant are regularly paid over to the master; therefore, when there has been such a course of dealing, in an action by the master against

against the servant for money had and received, it is not enough for the master to prove that sums have been received by the servant for his use ; but the *onus* lies upon him to prove by positive evidence, that the servant has not duly accounted with him.
Evans v. Birch, 10

MORTGAGE.

See SHIP, 11.

NOTICE OF ACTION

A local act of parliament provides that no action shall be commenced for any thing done *in pursuance* of the act, until after notice of action shall have been given.—*Held* that this applies to a case where the defendant acted under colour of the act, although he exceeded the powers conferred by it.
Graves v. Arnold, 242

NOTICE TO QUIT.

1. Where a house, lands, and tithes are held under a parol demise at a joint rent, a notice to quit "the house, lands, and premises, with the appurtenances," includes the tithes, and is sufficient to put an end to the tenancy.—*Seemle* that although tithes are let by parol, the tenant is entitled to a notice to quit. *Doe d. Morgan v. Church,* 71
2. If after the expiration of a notice to quit, the landlord gives the tenant a fresh notice that unless he quit in 14 days he will be required to pay double value, the second notice is no waiver of the first. *Doe d. Digby v. Steel,* 117
3. Where premises are taken under an agreement by which the "tenant is always to be subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months notice to quit, expiring at the same time of the

year it commenced, or any corresponding quarter day. But although the tenant under such an agreement enters in the middle of one of the usual quarters, if there appears to be no agreement to the contrary, he will be presumed to hold from the day he enters; and the tenancy can only be determined by a notice expiring that day of the year, or some other quarter day calculated from thence. *Kemp v. Derrett,* 510

4. Where a notice to quit, given by a rector to the tenant of his glebe land expired on the 25th of Dec. and on the 17th of Jan. following a sequestration was read in the church, and the rector afterwards by order of the sequestrator received from the tenant, who held over, a weekly allowance, which he described in a receipt as issuing out of the tithe and glebe ;—*Held*, that the rector might still maintain an ejectment, laying the demise on the 1st of Jan. as between the 25th of Dec. and the 17th of Jan. the tenant was a trespasser. *Doe d. Morgan v. Bluck,* 447
5. The vendor of a term, before the whole of the purchase money is paid, agrees with the purchaser that the latter shall have possession of the premises till a given day, paying the reserved rent in the mean time, and that if he does not pay the residue of the purchase-money on that day, he shall forfeit the instalments already paid, and shall not be entitled to an assignment of the lease.—The purchaser being thus put into possession, if the residue of the purchase-money is not paid at the day appointed, the vendor may maintain an ejectment without any notice to quit or demand of possession. *Doe d. Leeson v. Sayer,* 8

NUISANCE.

See INDICTMENT, 2, 3. Windows.

PARISH.

See INDICTMENT, 11. USE AND OCCUPATION, 1.

PARTNERS.

See BANKERS, 1. BANKRUPT, 5, 14. GUARANTIE, 3.

Where one of several partners; with the privity of the others, draws bills of exchange in his own name upon the partnership firm, in favour of persons who advance him the amount, which he applies to the use of the partnership, altho' the partners are not jointly liable on the bills, they may be jointly sued by the payees for money lent.

Denton v. Rodie. 493

PAYMENT OF MONEY INTO COURT.

1. In an action on a bill of exchange after payment of money into court, the defendant cannot object to the sufficiency of the stamp on which the bill is drawn. *Israel v. Benjamin*, 40
2. Payment of money into court can only be proved by the rule for paying it in. *Israel v. Benjamin*, 41

PERJURY.

See SURROGATE.

PEW.

See EVIDENCE, 4.

PLEADING.

See ASSUMPSIT. BANKRUPT, 8.

1. If an action on a promissory note made and dated in a foreign country, the declaration, without noticing that circumstance, may allege that it was made in the county in which the venue is laid. *Houliet v. Morris*, 304
2. If the owner of a horse lets him to hire for a certain time, during which he is killed by the owner of a cart driving it violently against him, the remedy of the owner of the horse

against the owner of the cart is *case* and not *trespass*. *Hall v. Pickard*, 187

3. If *A.* obtains a warrant against *B.* directed to *C.* and *D.* as constables, and voluntarily assists them in executing it, to trespass and false imprisonment brought by *B.* against the three others, *A.* as well as *C.* and *D.* may plead the general issue and give the special matter in evidence. *Nathan v. Cob*, 257
4. Where the burthen of repairing a highway is transferred by a public act of parliament from the parish to other persons, if the parish be indicted for not repairing this highway, there is no occasion for a special plea, stating who are bound to repair it, but the exemption may be taken advantage of under the general issue, of *Not Guilty*. *Rex v. St. George's Hanover Square*, 222

POLICY.

See INSURANCE.

PRACTICE.

1. In ejectment, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, the defendant on admitting the title of the lessor of the plaintiff under the will, has a right to begin and to have the general reply. *Doe d. Sir Ric. Corbett Bart. v. Corbett*, 368
2. In trespass quare clausum fregit, if the defendant pleads—as to coming with force and arms and whatsoever else is against the peace, *not guilty*, and as to the residue of the trespasses, a justification, which is denied by the replication; at the trial he has a right to begin and to have the general reply. *Hodges v. Holder*, 366
3. A

3. At the assizes, if business is not begun on the commission day, causes must be entered with the marshal before the sitting of the court on the first day of business. *Skeye v. Voyce*, 365
4. Refusal to certify for special jury, on application made the day after the trial. *Waggett v. Shaw*, 316
5. At nisi prius in K. B. the plaintiff cannot apply to put off the trial of his cause from sittings to sittings, but may from one day in the sittings to another. *Ansley v. Birch*, 333
6. A judge sitting at nisi prius at Westminster cannot upon motion make an order in a cause entered for trial in London. *Arlinson v. Dickinson*, 41
7. On the trial of a misdemeanor, the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury: but if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the Court will hear this argued by his counsel. *Rex v. White*, 98

PRECEDENCE.

Attorney and Solicitor General to have precedence above all the King's servants, xii

PREMIUM, RETURN OF.

See INSURANCE, 31.

PRINCIPAL AND AGENT.

See ACTION, 3. AUCTIONEER. BROKER. FACTOR. INSURANCE BROKER.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY TAX.

See USE AND OCCUPATION, 2.

REGISTER.

See SHIP, 7, 8, 9.

REPRESENTATION.

See INSURANCE, 13.

SALE.

See SHIP, 1, 2. ASSUMPSIT, INDEBITATUS, 2. BROKER. FRAUDS, STATUTE OF.

1. Where goods are sold by a written contract, which contains a description of their quality, without referring to any sample, if the goods do not correspond with that description, it is not material for the vendor to shew that they correspond with a sample exhibited at the time of sale to the purchaser, who was well skilled in the commodity, this not being a sale by sample, but by the description in the written contract. *Tye v. Fynmore*, 462
2. If a written contract for the sale of goods specifies no time for delivering them, in an action for not delivering them, it is not competent for the defendant to give parol evidence that it was a condition of sale that the goods should be taken away immediately, or that by the usage of trade where goods are sold to be delivered at a distant day, the time is always mentioned in the written contract. Although the purchaser of goods neglects, after notice, to carry them away, the seller has no right on that account to re-sell them. *Greaves v. Asplin*, 426
3. Where a person, in the country gives an order to a tradesman in London with whom he has been in the habit of dealing, to send him down more goods by a particular coach, and at the office of this coach there is a notice stuck up, intimating that the proprietors will not be answerable for goods above the value of ~~50~~ ¹⁰⁰ shillings insured, it is enough for the vendor to

to deliver the goods ordered at this office, although they be above the value of $\text{£}1$. without insuring them, unless he has insured for the purchaser in former instances. *Cothay v. Tute*, 129

4. Contract in London for the sale of tallow from a particular ship, on arrival—to be taken from the king's landing scale—if it should not arrive on or before a given day, the bargain to be void: The ship was wrecked off the coast of Scotland; but the cargo was saved, and might have been forwarded to the port of London by the given day: The vendors resold the tallow in Scotland: The purchasers did not offer them any indemnity if they would bring the tallow to London.—*Held*, that under these circumstances, the vendors were not answerable for the non-delivery of the tallow. *Idle v. Thornton*, 274

5. A delivery of goods at a wharf is not sufficient to charge the purchaser, unless the seller procures them to be booked, or takes a receipt for them, or delivers them in such a manner as to furnish a remedy over against the wharfinger. *Bucknan v. Levi*, 414

6. Where, in a contract for sale of sugar, there is the following term: "free on board a foreign ship," the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name. *Wackerbarth v. Mussen*, 270

7. In the conditions of sale of the lease of a public house, it was described as "a free public house;" the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer; this lease was all read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public house, and that the covenant about the

beer had been decided to be bad.—*Held*, that the purchaser who heard the lease read over, was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit. *Jones v. Edney*, 285

8. The purchaser of goods to be paid for by bill upon his agent, is not discharged by the seller taking a renewal of the bill without giving him notice, if the agent had not funds in hand to pay the bill when it became due. *Clarke v. Noel*, 411

SAMPLE.

See SALE, 1.

SCRIVENER.

See BANKRUPT, 1.

SEAMEN'S WAGES.

1. During a voyage the ship is wrecked, the captain gives the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging at the same time that he had hired them by the month.—*Held*, that under these circumstances, no action for wages could be maintained by the mariners against the captain, at least without proving that they had first made a demand upon the owners. *Forshoorn v. Kruger*, 197
2. Stat. 2. Geo. 2. c. 36. requiring articles to be entered into between the masters of ships and the mariners, and providing that the mariners shall not fail in any suit for wages from not producing the articles, does not apply to the case of a British seaman entering on board a foreign ship in a British port. *Dickman v. Benson*, 290
3. If foreign sailors stipulate in their own country before the commencement of a voyage, that they will not sue the captain for any money abroad, but be satisfied with what he may advance

vance them in deduction of their wages till they return home, they cannot maintain an action against him for wages, in the courts in this country. *Johnson v. Mackelsen*, 44

SEDUCTION.

See WITNESS, 8, 9.

SET OFF.

1. Where goods are sold, to be paid for by a bill of exchange at a given date, to an action commenced within that time for refusing to give such bill, the defendant cannot set off a debt due to him from the plaintiff. *Hutchinson v. Reid*, 329
2. In an action by the assignees of a bankrupt, it is not sufficient proof of a set-off, that the commissioners permitted the defendant to prove the debt proposed to be set off under the commission. *Pirie v. Menett*, 279

SHERIFF.

See TROVER, 4.

1. After a return to a writ of *fi. fa.* that the money is levied, the sheriff is liable to an action for money had and received, without any demand of payment. *Dale v. Birch*, 347
2. The sheriff cannot maintain an action for the expence incurred in seizing and keeping possession of goods under a *fi. fa.* at the request of the party suing out the writ, although they are not sold, on account of his refusing to give an indemnity against the claims of third persons. *Bills v. Havelock*, 374
3. An action for money had and received cannot be maintained by a landlord to recover the amount of a year's rent against the sheriff, who has sold his tenant's goods under an execution. *Green v. Anglin*, 260
4. In an action against the sheriff for a false return, to connect him with the acts of a particular officer in the execution of the writ, it is not enough to shew that this officer's name is written in the margin of the examined copy of the writ and return. But without producing the warrant, it was held to be enough to give in evidence a paper issued by the sheriff's office and directed to this officer, requiring him to give instructions for making a return to the writ. *Jones v. Wood*, 228
5. In an action against the sheriff for an escape upon *meine process*, it is enough, without producing the warrant, or giving direct evidence of the arrest or escape, to prove the sheriff's return of *cepi corpus*, and to shew that the party did not put in bail, and was not in the sheriff's custody at the return of the writ. *Fairlie v. Birch*, 397
6. In an action against the sheriff for an improper return to a *fi. fa.* which stated that he had paid a sum of money to the landlord of the premises for arrears of rent, it is not enough for him to prove that he paid the money to the landlord; but he should adduce some evidence that the rent was due. *Keighley v. Birch*, 521
7. For this purpose, the landlord of the premises is not a competent witness. *Id.*
8. The sheriff having taken goods in execution under a *fi. fa.* is not justified in selling them to the highest bidder greatly under their value; but if he cannot obtain a reasonable price, should return that they remain in his hands for want of buyers. *Keighley v. Birch*, 521
9. It is not a sufficient justification to the sheriff for refusing to execute process, that the individual against whose person or goods it issues has the appointment of domestic servant to a minister at our court, and that of this has been stuck up in the sheriff's office, unless the appointment

- ment be *bond fide*; and in an action against the sheriff for a false return, the plaintiff may shew the appointment is merely colourable. *Delvalle v. Plomer*, 47
10. If upon the goods of a tenant being taken in execution, an agent of the landlord takes from the sheriff's officers an undertaking for a year's rent, and then consents to the goods being sold, the landlord cannot afterwards maintain an action against the sheriff on 8 Ann. c. 11. § 1. for not paying a year's rent on making the levy; although the rent is not paid according to the undertaking, and although the undertaking should be void under the statute of frauds for not stating any consideration. *Rothery v. Wood*, 24

SHIP.

See ACTION, 3. AVERAGE. SEAMEN'S WAGES.

1. If a ship is sold *with all faults*, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser. *Baglehole v. Walters*, 154
2. Although a ship be sold, "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, and used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale. *Schneider v. Heath*, 506
3. Where the charterer of a ship for a voyage to Tobago and back, covenanted to load and dispatch her in time to join the convoy that should be appointed to sail from the West Indies on the 1st of August;—*held* that he was liable for not having loaded and dispatched her by the 22d of July, the day the West India convoy passed the Island of Tobago, although he offered to load her with a complete cargo if she would stop a few days longer. *Thompson v. Inglis*, 428
4. The master of a ship has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side. *Bishop v. Ware*, 360
5. Where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her, in time for the July convoy provided she arrived out and was ready by the 25 June;—*held*, that as she did not arrive out till after the 25 June the freighter was entirely discharged from his contract to furnish a cargo. *Shadforth v. Higgin*, 385
6. Where the charterer of a ship to Jamaica and back, covenanted to load her there with a complete cargo of sugar and to pay freight for the same at the rate of 10s. 6d. per cwt. and his agent at Jamaica tendered a complete cargo to the captain, but insisted on his signing bills of lading for it at 10s. per cwt. which the captain refused to do;—*Held*, that the charterer was liable for dead freight. *Hyde v. Willis*, 202
7. In an action for stores supplied to a ship, if the defendant pleads in abatement that he is only liable jointly with others, it is not enough for him to produce the ship's register, containing the names of himself and those others as owners of the ship. *Flower v. Young*, 240
8. In an action against the owner of a ship for stores supplied to her, the register purporting to be granted on the oath of the defendant, and stating him the sole owner, is no evidence of ownership. *Smith v. Fuge*, 456
9. To prove that a ship is British-built, a British register so describing her is by itself no evidence. *Rouffe v. Meyers*, 475
10. A

10. A ship was described in a memorandum for charter as "the Swedish ship or vessel called the Maria." In fact she was British-built, and had a British register, but she had a complete set of Swedish papers and a treasury licence to sail as a Swedish ship, which particulars were known to the freighter:—*Held*, that in an action against him for not loading and dispatching the ship according to the memorandum for charter, he could not set up as a defence that she was in point of fact a British and not a Swedish ship. *Reusse v. Meyers*, 475

11. Where a ship is mortgaged, but the mortgagor continues in possession, the master employed by him cannot maintain an action for wages and disbursements against the mortgagee. *Ann. tt v. Carstairs*, 354

12. If the master of a ship in a foreign port, from the state of the exchange receives a premium for a bill drawn upon England on account of the ship, this belongs to his owner, although there may have been a usage for masters of ships to appropriate such premiums to their own use. *Diplock v. Blackburn*, 43

13. If the captain of an East Indiaman dies at the outward port after having contracted to bring home certain passengers, and laid in a certain quantity of stores for the homeward voyage; and the chief mate succeeding to the command brings home these and other passengers, and provides further stores for their subsistence during the voyage; the captain's representatives are entitled to the passage money of the passengers with whom he had contracted, and the mate to that of the others;—the representatives being liable to him for the portion of the stores laid in by him consumed by the former class of passengers, and he being liable to the representatives for the portion of the captain's stores con-

sumed by the latter class of passengers. *Siordet v. Brodie*, 253

14. Where a ship is chartered by a charter-party under seal, which provides specifically for the payment of freight from the charterer to the owner, a person who receives goods carried by the ship in this voyage as indorsee of the bill of lading which makes them deliverable to order or to assigns on payment of freight as per charter-party, is liable to pay freight to the charterer accordingly; although he has paid over the proceeds of the goods to the person who indorsed the bill of lading to him, before being called upon to pay the freight. *Bell v. Kymer*, 545

SLANDER.

See WORDS. LIBEL.

SOUTH SEA COMPANY.

Seem that after a ship has sailed on a voyage to a place within the limits of the S. S. Company, a retrospective licence granted by the company, is insufficient to legalize the voyage. *Hobbs v. Hannam*, 95

STAMPS.

See APPRENTICE, 1. BILLS OF EXCHANGE, 24. PAYMENT OF MONEY, 1. INIO COURT, 1.

1. Although a policy of insurance produced at the trial of an action, has a sufficient stamp, evidence will be received that it had no such stamp when it was effected, in which case it is a mere nullity, though stamped wards by order of the of stamps; for this is forbidden 35 G. 3. c. 63., and not authorized by 37 G. 3. c. 136. which extends to such instruments as could be legally stamped after they were executed. *Roderick v. Harvil*, 100

2. If a stamp is necessary to the validity

- of an agreement made in a foreign country, an agreement made there, unless it has such stamp, cannot be received in evidence in our courts of justice. But it is incumbent upon the party who objects to the validity of the agreement, to prove the law requiring the stamp, by an authenticated copy, if it be in writing, and if not, by the testimony of a witness acquainted with the laws of the foreign country. *Clegg v. Levy*, 166
3. A receipt for taxes signed by a clerk of the deputy receiver-general of a county in their name, may be given in evidence without a stamp. *Edden v. Read*, 338
4. A. and B. for a debt due to C. agree to give him a bill of exchange to be drawn by A. and accepted by B.—Instead of this, they send him a promissory note made by the one and indorsed by the other, which he immediately returns to be altered into a bill of exchange according to the agreement.—The instrument so altered is a valid bill of exchange, without a fresh stamp, as it had not been negotiated in the shape of a promissory note, and the alteration may be considered as the mere correction of a mistake. *Webber v. Maddocks*, 1
5. An accommodation bill payable to the drawer's order cannot be altered after acceptance and an attempt to negotiate it, and before it is actually negotiated. *Calvert v. Roberts*, 343
6. Q. Whether a 2s. stamp be sufficient for a bill for "50l. with all legal interest." *Israel v. Benjamin*, 40

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SUGAR.

See SALE, 6.

SURROGATE.

Upon an indictment for perjury before a surrogate in the ecclesiastical court, the fact of the person who administered the oath having acted as a surrogate, is sufficient *prima facie* evidence of his being duly appointed, and having authority.

authority to administer the oath. But if it appear that the surrogate was appointed contrary to the canon, which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf, his appointment is a nullity, and the averment that he had authority to administer the oath is negatived. *Rex v. Verelst*, 432

TAVERN.

See WAGER, 2.

1. Where a party of several persons dine together at a tavern, they are jointly liable for the whole expence, and not merely each for his own share. *Forster v. Taylor*, 49
2. But the officers of a regimental mess are only separately liable, each for his own share. *Brown v. Doyle*, 51 n

TENDER.

It is not a good tender of a fractional sum, for the debtor to offer the creditor a bank note to a larger amount, and to desire him to take out of that the sum to be paid. *Betterbee v. Davis*, 70

TITHES.

See NOTICE TO QUIT, 1

TRADER.

See BANKRUPT, 1, 2.

TRESPASS.

See PLEADING, 2, 3.

If a person whose real name is William, is asked, before process issues against him, whether his name is not John, and he says it is, he cannot maintain trespass for what is done in execution of the process against him by the wrong name. *Price v. Harwood*, 108

TRIAL.

See INDICTMENT, 6.

TROVER.

See BILL OF LADING.

1. Refusal to deliver goods, by person ignorant of real owner, no evidence of conversion. *Green v. Dunn*, 215 n.
2. The plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver.—*Held*, that the plaintiff could not maintain trover for the watch, on proof that the candlesticks were of base metal. *Emanuel v. Dane*, 299
3. A paid a Bank of England note to B., who paid it to C., who presented it at the Bank, where it was stopped, on the ground that it had been fraudulently obtained from a former holder.—*Held*, that although A. thereupon paid the amount of the note to C., in discharge of the debt due to him from B., A. could not maintain trover for the note against the Bank of England. *Benjamin v. Bank of England*, 417
4. Where after a secret act of bankruptcy the sheriff took in execution the goods of a trader under a *fi. fa.*, and removed them to a broker's, and the assignees of the bankrupt afterwards served a notice upon him not to sell them; for which reason they were allowed to remain unsold at the broker's;—*Held*, that the sheriff was liable to an action of trover at the suit of the assignees, without any demand of the goods. *Wyatt v. Blades*, 417

5. In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion. *Mercer v. Jones*, 417

VARIANCE.

VARIANCE.

See **BILLS OF EXCHANGE**, 1, 3.
USE AND OCCUPATION, 1.

VENDOR AND PURCHASER.

See **SALE**.

VENUE.

See **APPRENTICE**, 3. **PLEADING**, 1.
USE AND OCCUPATION, 1.

USE AND OCCUPATION.

1. In an action for use and occupation, although it be unnecessary to state in the declaration in what parish the premises are situate, if this is alleged, a variance in the name of the parish is fatal. *Guest v. Caumont*, 235
2. In an action for use and occupation, where the tenant has paid the property tax before action brought, he has a right to deduct it at the trial. *Baker v. Davis*, 474
3. Where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to an action for use and occupation. *Smith v. Raleigh*, 513

USURY.

1. If an usurious security be given for a legal subsisting debt, although the security is void, the debt is not extinguished. *Phillips v. Cockayne*, 119
2. An agreement that London bankers should accept and pay bills of exchange drawn in the country for a commission of 5s. per cent. being furnished with funds to pay the bills before they became due, cannot be usurious, there being no contemplation of an advance of money. If upon such an agreement an advance of money were contemplated, it would be a question of fact, whether the commission was a shift to obtain more than legal interest for the forbearance, or a compensation for the

trouble and expence incurred in accepting and paying the bills of exchange. *Masterman v. Cowrie*, 488

WAGER.

1. An action may be maintained upon a wager of a *rump and dozen*, whether the defendant be older than the plaintiff. *Huffey v. Crickitt*, 168
2. When a dinner is ordered at a tavern by the authority of two persons who have laid a wager of a *rump and dozen*, if the winner pays the bill, he may maintain an action against the loser for money paid to recover the amount. *Huffey v. Crickitt*, 168
3. No action can be maintained upon a wager on a cock fight. *Squires v. Whifken*, 140

WALES.

Stat. 26 Hen. 8 c. 6. authorizing the trial of felonies committed in Wales, in the next adjoining English county, extends to felonies subsequently created. *Ren v. Window*, 78

WARRANTY.

See **INSURANCE**. **SHIP**, 1, 2. **TROVER**, 2.

Where a customer who had bought a quantity of burgundy of excellent quality from a wine merchant, some time after procured him to exchange a portion of it for wine of a different description;—*held*, that there was no implied warranty on the part of the customer as to the state of the wine at the time of the exchange, and that although it had then become quite sour, the wine merchant had no remedy, without proof that the other knew its deteriorated condition, and intended to practise a fraud. *La Neuville v. Nourse*, 351

WHARFAGE.

See **SHIP**, 4.

WINDOWS.

WINDOWS.

1. If an antient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the antient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window than was antiently enjoyed. *Chandler v. Thompson*, 80
2. If an antient window has been completely shut up with brick and mortar above twenty years, it loses its privilege. *Lawrence v. Ober*, 514
3. An action for a nuisance to a house cannot be maintained for that which was no nuisance to the house before a new window was opened in it by the plaintiff, and which becomes a nuisance only by that act. *Lawrence v. Ober*, 514

WITNESS.

See ATTESTING WITNESS. SHERIFF, 7.

1. An underwriter who pays on a promise of re-payment if the policy be determined to be invalid, is not a competent witness for another underwriter who disputes the loss. *Alley*, if the promise of repayment had been made after he had paid unconditionally, or if the plaintiff had fraudulently entered into the agreement with him for the purpose of taking off his testimony. *Forrester v. Pigou*, 360
2. In an action for goods sold, a person who entered into a contract for the purchase of the goods in his own name, is not a competent witness to prove that he purchased them as the agent of the defendant. *McBrain v. Fox*, 317
3. In ejectment on the several demises of two persons, although the evidence shews the title to be exclusively in one of them, the other cannot be compelled to be examined as a witness

- for the plaintiff. *Fenn d. Pewtriss v. Granger*, 177
4. Where, in an action against two defendants, one pleads his bankruptcy, and the other the general issue, the former cannot, on proof of his certificate, be made a witness for the latter. *Currie v. Child, Pritchard, and Brown*, 283.
5. A carrier employed by A. first to carry a sum of money to B. and then the like sum to C., in an action by A. against C. is a good witness from necessity to prove that by mistake he delivered the first sum to C. as well as the second. *Barker v. Macrae*, 144.
6. In an action by the sheriff on a bail bond, the bound bailiff who made the caption is a competent witness to prove the execution of the bond, if the defendant knowing his situation asked him to become attesting witness. *Honeywood v. Peacock*, 196
7. In an action for a libel in the shape of an extrajudicial affidavit sworn before a magistrate, a person who acted as the magistrate's clerk is not bound to answer whether by the defendant's orders he wrote the affidavit and delivered it to the magistrate, as he might thereby criminate himself. *Maloney v. Bartley*, 210
8. In an action for seducing the plaintiff's daughter *per quod servitium amisit*, the daughter is not bound to answer in cross examination whether she had not been previously criminal with other men. *Dodd v. Norrie*, 519
9. In such an action evidence cannot be admitted that the defendant accomplished the seduction by means of a promise of marriage. Nor does the mere cross-examination of the daughter to shew that she had been guilty of improper conduct, entitle the plaintiff to call other witnesses to her character. *Dodd v. Norrie*, 519
10. Notwithstanding the oath administered

ed to a collector of the property tax by the commissioners, that he will not disclose any thing he learns in that capacity, except with their consent, or by virtue of an act of parliament, he is bound when subpoenaed as a witness, to give evidence of all facts within his knowledge touching the matter in question. *Lee q. t. v. Birrell*, 337

11. Where to trespass for breaking through the wall of the plaintiff's house, the defendant pleaded a licence, to which the plaintiff now assigned *swears*; it appeared that the plaintiff had given the defendant leave to do what was necessary for repairing his own house, which adjoined the plaintiff's; and it was held, that the workmen employed to do the repairs were competent witnesses for the defendant to disprove the excess, without a release. *Cutburt v. Gosling*, 515

12. It is no sufficient ground for receiving evidence of the hand-writing of a witness, which would be receivable if he were dead, that he is unable to attend the trial from indisposition, and

lies without hopes of recovery. *Harrison v. Blakes*, 457

13. Upon an issue to try the validity of a commission of bankrupt, a creditor is not a competent witness to support the commission, although he does not appear to have proved under it. *Adams v. Malkin*, 543

WORDS.

See LIBEL.

1. An action for defamation cannot be maintained against a man whose property has been stolen, and who upon reasonable grounds of suspicion charges an innocent person with having stolen it. *Fowler v. Homer*, 294

2. In an action for words which may be understood to convey a charge either of felony or fraud, although they would be actionable in the latter sense as well as the former, if the declaration contains an innuendo that the defendant thereby meant to impute felony to the plaintiff, this is material, and must be made out in evidence. *Smith v. Carey*, 461

END OF THE THIRD VOLUME.

